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CARD 1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1896

No. [redacted]97

MANUEL ZENO GANDIA, PLAINTIFF IN ERROR,

vs.

H. B. K. PETTINGILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED JULY 24, 1896.

(21,781.)

(21,761.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 278.

MANUEL ZENO GANDIA, PLAINTIFF IN ERROR,

vs.

N. B. K. PETTINGILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1910.

1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss.

At a Stated Term of the District Court of the United States for Porto Rico, within and for the District aforesaid, begun and held at the court-rooms of said Court in the city of San Juan, on the second Monday of October, being the twelfth day of that month in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

Present, the Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a judgment in the following case, to wit:

No. 467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA,

and

No. 548. Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Be it remembered that heretofore, to-wit, on the eighth day of December, 1908, came the plaintiff by his attorney and filed his Re-Written Complaint in this cause, which said complaint is as follows, to-wit:

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

Libel. Damages $50,000.

2 The plaintiff above named, H. B. K. Pettingill, sues the defendant, Manuel Zeno Gandia, in an action for libel, and complaining alleges:

1.

That the plaintiff is and was at the times hereinafter mentioned a citizen of the United States, and that the defendant is and was a citizen of Porto Rico.

2.

That the plaintiff is, and at all times hereinafter mentioned was, an attorney at law qualified to practice his profession before all the courts of Porto Rico and before the Supreme Court of the United States, and was actually and actively engaged in the practice of said profession in all parts of the island of Porto Rico and before said Supreme Court of the United States, and also enjoyed the office and title of United States Attorney for Porto Rico and performed the duties of said office.

3.

That the said plaintiff also, at and up to the times of the publication of the various libels hereinafter set forth, enjoyed and deserved the confidence and esteem of the people of Porto Rico, both personally, professionally and as such United States Attorney, and had a fair reputation among a large circle of friends and acquaintances in the United States.

4.

That the defendant was at all times hereinafter mentioned the owner and publisher, and had the control of, a certain newspaper published in the city of San Juan, Porto Rico, in the Spanish language called "La Correspondencia", and was also the editor thereof, and that said newspaper was published daily and had a large circulation throughout said island of Porto Rico.

5.

That on the 26th day of April, A. D. 1906, the defendant, well knowing the premises but wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff in his said profession and office, in defendant's said newspaper called "La Correspondencia", a certain false, scandalous, malicious and defamatory libel, containing (among other things), the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff, that is to say:

"Las leyes de Puerto Rico prohiben que un abrogado pueda á un " mismo tiempo desempeñar el cargo de fiiscal de una corta y ejercer " su profesión. Y por qué tal ley ocurrió nuestra legislatura? Pues, " porque las leyes se inspiran en principios de moral y es una in- " moralidad, que fué sin duda repugnante á los legisladores puerto- " riqueños, que un hombre ejerza como abogado ante el mismo " tribunal en donde desempeña el mas alto cargo después del Juez: " el cargo de fiscal que acusa á los delicuentes ó á los que cestán fuera " de la ley. * * * Los enimigos del pueblo de Puerto " Rico los que lo persiguen, los que contra él litigan, los que lo ponen " pleitos, invitan al abogado Petingil á asciarse á su enemistad y " á conducirles á un litis máso menos injustos en contra de Puerto " Rico. Y el Señor Pettingil accede gustoso y demanda al pueblo " de Puerto Rico en cobro de pesos o en reclamacion de derechos.

" Poco después de formulada la demanda, un "voucher" es archivado " en el departmento del Auditor y en aquel consta que el pueblo de " Puerto Rico ha pagado exactamente el sueldo que le obligan á " pagar, al mismo hombre que aliado con otros le conmina, le com- " bate y le empuja á un pleito para entrar en el cual debeira antes " devolverse el sueldo. * * * No se puede, no se debe engañar, " la opinión pública de los Estados Unidos, haciéndola creer que " puritana pulcritud nos rige y que hombres de rectitud nos hacen " justicia, mientras haya en Puerto Rico una Corte Federal en la " cual actuá un funcionario que se llama Fiscal que acusa ante " la corte y pleitea contra el pueblo: y mientras se obligue al Pueblo " de Puerto Rico á pagar esa monstruosa inmoralidad y ese abuso " de su paciencia."

which said words signified and meant in the English language as follows, that is to say:

The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of a prosecuting attorney of a court and to exercise his profession. And why did such a law occur to our legislators? For the reason that laws are inspired by principles of morality, and it is an immorality which was without doubt repugnant to Portorican legislators that a man should act as a lawyer before the same tribunal where he holds the highest office after the Judge; the office of prosecuting attorney, who makes accusations against delinquents or against those who are beyond the pale of the law. * * * The enemies of the People of Porto Rico, those who are pursuing it, those who are litigating against it, those who ... suits against it, invite the lawyer Pettingill to associate himself with their hostility and to lead them in a lawsuit, more or less unjust, against Porto Rico. And Mr. Pettingill gladly agrees and brings suit against the People of Porto Rico for the collection of money or the establishment of some right. Shortly after the complaint is formulated, a voucher is filed away in the Department of the Auditor and in that it appears that the People of Porto Rico has paid the very salary which they oblige it to pay to the same man who, leagued with others, threatens it, opposes it, and forces it into a suit, before taking part in which his salary ought to be returned. * * * The public opinion of the United States cannot, and ought not to be deceived by causing the belief that puritanic scrupulousity prevails among us and that upright men dispense justice for us, while there exists in Porto Rico a Federal Court in which an official performs his duties who is called a Prosecuting attorney who formulates accusations before the Court and brings suits against the People: and while the obligations rests upon the People of Porto Rico to pay that monster of immorality and that abuse of the People's patience.

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney for Porto Rico as aforesaid.

6.

That on the 28th day of April, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

"Es evidente que la legislatura de Puerto Rico considera
" una inmoralidad que el fiscal de una corte ejerza su pro-
" fesión de abogado ante la misma corte, de la cual es funcionario.
" Y es evidente también que el poder legislativo de la isla está
" ilegalmente contrariado por el abogado señor Pettingill quien
" fundado en derechos que este pueblo desconoce, si es que existen,
" está ejerciendo en una corte fundada en Puerto Rico por el Gobierno
" de los Estados Unidos dos funciones incompatibles, la de fiscal y
" la de abogado en ejercisio ante esa corte.

which said words signified and meant in the English language as follows, that is to say:

It is evident that the Legislature of Porto Rico considers it immoral that the Prosecuting Attorney of a court should exercise his profession as a lawyer before the same court of which he is a functionary. And it is also evident that the legislative power of the island is illegally opposed by the lawyer Mr. Pettingill who, claiming rights of which this country is ignorant, if indeed they exist, is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that court.

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.

7.

That on the 7th day of June, A. D. 1906, the defendant, well knowing the premises but further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious and libelous article, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

6 "El señor Petingill ya como fiscal ya como abogado, ó
"ya como ambas cosas, no se atrevería á hacer en los Esta-
"dos Unidos lo que está impunemente realizando. Pero no importa
"que el se considere tambien impune en Puerto Rico. Ceda en su
"error. Los puertoriqueños no consentiran el abuso de su paciencia.
"Si ese hombre, fiscal y abogado a un mismo tiempo y ante el mismo
"tribunal, no resuelve por si mismo la dificultad y no da termino al
"escandalo que en el pais produce, será necesario que lá protesta
"puertoriqueña haga conocer en Washington este nuevo abuso que
"con nosotros se comete."

which said words signified and meant in the English language as follows, that is to say:

Mr. Pettingill, whether as Prosecuting Attorney, as lawyer, or in both capacities, would not dare to do in the United States what he is here accomplishing with impunity. But it makes no difference that he may consider himself also exempt from punishment in Porto Rico. Let him desist from his error. The Porto Ricans will not consent to the abuse of their patience. If that man, prosecuting attorney and lawyer at the same time and before the same court, does not resolve the difficulty by his own act and does not put an end to the scandal which he is producing in the country, it will be necessary that the Portorican protest make known in Washington this new abuse which is being committed toward us.

which said words so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his professional and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.

8.

That on the 7th day of July, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

"Y esos augurios de grandes pleitos hacen que un abogado ó
"representante ó defensor ó no sabemos que cosa de la tal compañía,
"tenga parlamentos con el Consejo y éste le escuche y le reconozca
"personalidad dentro de las leyes para dirijirse á él con una
7 "oficiosidad que nosotros consideramos completamente fuera
"de la ley. Pues, bien; ese abogado es el abogado Pettingill,
"un caballero norteamericano que es fiscal de una corte norteameri-
"cana y que considera que puede ejercer las funciones de fiscal,
"cobrarle un pingue sueldo al Tesoro de Puerto Rico, y ponerle

" pleitos al pueblo de Puerto Rico, injuriando, caluminando y meno-
" spreciando sus representaciones de gobierno."

which said words signified and meant in the English language as follows, that is to say:

And these indications of important suits form the basis for a lawyer, or a representative, or defender, or we know not what, of said Company to hold conferences with the Council, for the latter to listen to him and recognize in him a personality within the laws sufficient for him to address himself to it with an officiousness which we consider entirely out of place. Very well; that lawyer is lawyer Pettingill, a North American gentleman who is the Prosecuting Attorney of a North American court who thinks he can exercise the duties of prosecuting attorney, collect a large salary from the Treasurer of Porto Rico, and carry on suits against the People of Porto Rico, damaging, slandering and making light of its governmental authority.

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.

9.

That on the 3rd day of October, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

" Un asunto tramita actualmente la Corte Federal entre el Señor
" A. L. Arpin demandante y la "Porto Rico Power & Light Company
" demandada. Se trata de la concesión del Salto de Comerío.
8 " El abogado Pettingill, fiscal de la corte ante la cual se ventila
" el pleito y abogado en ejercisio en pleitos en contra del
" pueblo de Puerto Rico, es el abogado del demandante.

" Como la cuestión se refiere á una concesión de privilegio hecha
" por el Consejo Ejecutivo, cuyos miembros son nombrados por el
" Presidente de los Estados Undios, actos de ese consejo son discu-
" tidos y combatidos en el citado pleito. No es cuestión, en estas
" líneas, de saber quién tiene ó no tiene razón, cosa que debe juzgar
" el tribunal competente con arreglo á su rectitud y sabiduría.

" Trátase solamente aquí demostrar de qué manera el fiscal de la
" corte Federal, que es abogado en ejercicio de pleitos en un pais
" como este, en al cual las leyes prohiben que los fiscales de las cortes
" ejerzan la profesión de abogado y que los empleados que perciben
" sueldos del pueblo de Puerto Rico, a cuyas leyes deben jurar fideli-
" dad, falten á sus deberes peleando en contra de Puerto Rico é

" insultando á Corporaciones creadas por el Congreso de los Estados " Unidos y elegidas y nombradas por el Presidente."

which said words signified and meant in the English language as follows, that is to say:

A suit is at present going on in the Federal Court between Mr. A. L. Arpin, plaintiff, and the "Porto Rico Power & Light Company," defendant. It involves the concession of the Falls of Comerio. Lawyer Pettingill, the Prosecuting Attorney of the court before which the suit is being heard and a lawyer employing himself in suits against the People of Porto Rico, is the lawyer of the plaintiff.

As the question refers to a concession made by the Executive Council, whose members are appointed by the President of the United States, the acts of that Council are discussed and criticized in that suit. As to these lines it is not a question of who is or is not right, a question which the competent tribunal ought to decide accordin- to its justice and wisdom.

Here it is only attempted to be shown of what quality is the Prosecuting Attorney of the Federal Court, who is a lawyer practicing his profession in a country like this in which the laws prohibit the prosecuting attorneys of the courts from practicing their profession as lawyers and the employees who receive salaries from the People of Porto Rico, to whose laws they must swear fidelity, from violating their duties by fighting against Porto Rico and insulting the Corporate Bodies created by the Congress of the United States and selected and appointed by the President.

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.

10.

9 That in the same article composed and published, and caused to be composed and published, by the defendant in his said newspaper called "La Correspondencia" on said 3rd day of October, 1906, said defendant quoted at length from the bill of complaint in the suit referred to in said article, alleging that the contents thereof were insulting to the members of said Executive Council, that said plaintiff had no right to make such allegations while holding the office of United States Attorney, that said members of said Executive Council owed it to themselves to resent the making of these alleged insulting charges, and that, unless action was taken by the Executive Council, the people themselves would find it necessary to ask the President and Congress of the United States to make an investigation; that said Executive Council at a session held on the 4th day of October, 1906, received a communication from its Committee on Franchises, Privileges and Concessions which made reference to the malicious and defamatory libel, contained in "La Correspondencia" of October 3rd, 1906, as aforesaid, and requested the appointment of a special committee to report as to what action should

be taken in regard thereto, which request was complied with and a committee appointed; that said Council at a session held on the following day received the report of said special committee and, in conformity therewith, adopted a resolution requesting the Governor of Porto Rico to forward the matter relating to the said alleged improper and immoral actions of plaintiff as charged as aforesaid by defendant to the President of the United States for his consideration and action; that the Governor of Porto Rico, in compliance with said request, did so forward the same to the President of the United States; and that the aforesaid action of said Executive Council and its said committee was based upon and incited by, and expressly recited and referred to, the aforesaid false, malicious and libelous article caused to be composed and published by defendant as aforesaid.

11.

That from the year 1900 to the 29th day of November, 1906, when he was summarily removed from office the plaintiff had continued to hold and enjoy said office of United States Attorney for Porto Rico and the emoluments thereof; that during said period above specified plaintiff had also acquired and enjoyed a large and lucrative private practice, which was generally known among the people of Porto Rico; that from the year 190- the defendant had been the owner and editor of said newspaper called "La Correspondencia", during all said time published in San Juan as aforesaid, and had well known of plaintiff as holding said office of United States Attorney and practicing privately as aforesaid, yet defendant had never in his said newspaper referred to a criticized such action or practice of plaintiff until the first of the series of articles hereinbefore alleged and set forth; that on or about the 20th day of March, A. D. 1906, plaintiff, as solicitor in chancery for one Francisco Antonmgiorgi, prepared and filed a bill on the chancery side of said United States District Court for Porto Rico against three certain defendants, one of whom was defendant Manuel Zeno Gandia, alleging that he caused to be drawn up by a Notary a certain document which purported to be the last will and testament of the mother of the wife of defendant, who died at the house of defendant in the month of November, 1905, wherein defendant was named as an Executor and whereby the wife of defendant was to be illegally and fradulently benefitted as an heir and the complainant in said suit deprived of all that portion of his legitimate inheritance which the law left at the disposition of said deceased, who was his mother, further alleging that defendant caused said document to be published and held out as the last will and testament of said deceased and under its authority, as one of its alleged Executors, had illegally obtained possession and control of said estate of his said mother in law, and praying that said alleged will be declared a false and illegal document and that, pending said suit, a Receiver for said estate be appointed by said Court; that on the 28th day of March, 1906, a Receiver was appointed by said Court for said estate, removing the possession and

11 control thereof from the defendant and his alleged co-executors, and continued in possession thereof until long after the series of libelous articles hereinbefore specified had been begun by defendant; and that said series of articles specified in the respe-tive paragraphs of this complaint were not composed or published by the defendant in good faith or from any good motive, but were composed and published solely from an evil motive of malice and revenge against plaintiff for his connection with the suit so filed as aforesaid by said Antongiorgi against defendant.

12.

That each and every of the publications hereinbefore set forth was made by defendant in the manner aforesaid with express and actual malice toward the plaintiff, by reason whereof plaintiff is entitled to recover exemplary or punitive damages in this suit.

13.

That at the time of the publication of said libelous articles in said newspaper "La Correspondencia" as aforesaid said newspaper had an extensive circulation throughout said island of Porto Rico whereby said libel was scattered broadcast; and that the said libelous articles of defendant as aforesaid were published and circulated in the newspapers throughout the United States by the organization known as the "Associated Press," and thereby circulated from one end to the other of the United States, to the further great damage of the plaintiff in his feelings and reputation.

Wherefore the plaintiff claims judgment against the defendant for actual and exemplary damages in the sum of Fifty Thousand Dollars, together with his costs of suit and the attorney's fee allowed by statute.

WILLIS SWEET,
F. L. CORNWELL,
H. P. LEAKE,
Attorneys for Plaintiff.

12 *Motion to Strike Parts of the Rewritten Complaint Filed December 9th, 1908.*

(Filed December 14, 1909.)

Libel. Damages, $50,000.

N. B. K. PETTINGILL, Plaintiff,
vs.
MANUEL ZENO GANDIA, Defendant.

Comes defendant and moves the Court to strike from the amended nd re-written complaint filed herein on December 9th, 1908, the ollowing words, letters, paragraphs and figures, to wit:

I.

In paragraph 2 thereof, the following:

* * * "and also enjoyed the office and title of United States Attorney for Porto Rico and performed the duties of said office,"

because plaintiff having been removed by the President of the United States from said office of United States District Attorney, for reasons deemed sufficient by said President, the same are not and cannot be made the subject of inquiry herein and hence plaintiff's removal by the President cannot be urged as an element of damage herein.

II.

In paragraph 3 of said rewritten complaint the words:

"and as such United States Attorney"

for the same reasons set out in paragraph I of this motion.

III.

In Paragraph 5 of said rewritten complaint the words:

"and office"

in the seventh line thereof, for the same reasons set out in paragraph 1 of this motion.

13

IV.

In paragraph 5 of said rewritten complaint, the words:

"and in respect of his official position as United States District Attorney for Porto Rico as aforesaid"

in the three last lines of said paragraph, for the same reasons set out in paragraph one of this motion.

V.

In paragraph 6 of said rewritten Complaint the words:

"and office"

in the third line thereof, and the words:

"and in respect of his official position as United States Attorney as aforesaid"

in the two last lines of said paragraph 6 of said Complaint, for the same reasons as are set out in paragraph one of this motion.

VI.

All of said Paragraph 6 of said rewritten complaint, as follows:

"6. That on the 28th day of April, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defend-

ant's said newspaper called "La Correspondencia," another certain false, scandalous, malicious, and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

"Es evidente que la legislatura de Puerto Rico considera una inmoralidad que el fiscal de una corte ejerza su profesión de abogado ante la misma corte, de la cual es funcionario. Y es evidente también que el poder legislativo de la isla está ilegalmente contrariado por el aborgado Señor Pettingill quien fundado en derechos que este pueblo desconoce, si es que existen, est ejerciendo en una corte fundada en Puerto Rico por el Gobierno de los Estados Unidos dos funciones incompatibles, la de fiscal y la de abogado en ejercicio ante esa Corte."

which said words signified and meant in the English language as follows, that is to say:

"It is evident that the Legislature of Porto Rico considers it in moral that the Prosecuting Attorney of a court should exercise his profession as a lawyer before the same court of which he is a functionary. And it is also evident that the legislative power of the island is illegally opposed by the lawer Mr. Pettingill who, 14 claiming rights of which this country is ignorant, if indeed they exist, is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that Court."

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid."

for the same reasons set out in paragraph I of this motion and for the additional reason that the same relates solely and only to the acts and doings of the Legislature Assembly of Porto Rico and therefore not proper subject of discussion in this suit nor one that can be urged as an element of damage against defendant herein.

VII.

All of paragraph 5 of said rewritten Complaint as follows:

"5. That on the 26th day of April, A. D. 1906, the defendant, well knowing the premises but wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff in his said profession and office, in defendant's said newspaper called "La Correspondencia," a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff, that is to say:

"Las leyes de Puerto Rico prohiben que un abogado pueda a un mismo tiempo desempeñar el cargo de fiscal de una corte y ejercer

su profesión. ?Y por qué tal ley ocurrió á nuestra legislature? Pues, porque las leyes se inspiran en principios de moral y es una inmoralidad, que fué sin duda repugnante á los legisladores puertoriqueños, que un hombre ejerza como abogado ante el mismo tribunal en donde desempeña el mas alto cargo después del Juez: el cargo de fiscal que acusa á los delincuentes ó á los que están fuera de la ley * * * Los enemigos del Pueblo de Puerto Rico, los que lo persiguen, los que contra él litigan, los que le ponen pleitos, invitan al abogado Pettingill á asociarse á su enemistad y á conducirles á un litis mas o menos injusto en contra de Puerto Rico. Y el señor Pettingill accede gustoso y demanda al pueblo de Puerto Rico en cobro de pesos o en reclamacion de derechos. Poco despues de formulada la demanda, un "voucher" es archivado en el departamento del Auditor y en aquel consta que el pueblo de Puerto Rico ha pagado exactamente el sueldo que le obligan á pagar, el mismo hombre que aliado con otros le conmina, le combate y le empuja á un pleito para entrar en el cual debiera antes devolverse el sueldo * * * No se puede, no se debe engañar, la opinión pública de los Estados Unidos, haciéndola creer que puritana pulcritud nos rige y que hombres de rectitud nos hacen justicia, mientras haya en Puerto Rico una Corte Federal en la cual actúa un funcionario que se llama Fiscal que acuse ante la corte y pleitea contra el pueblo y mientras se oblique al Pueblo de Puerto Rico apagar esa monstruosa inmoralidad y ese abuso de su paciencia."

which said words signified and meant in the English language as follows, that is to say:

"The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of a prosecuting attorney of a court and to exercise his profession. And why did such a law occur to our Legislature? For the reason that laws are inspired by principles of morality, and it is an *immorality* which was without doubt repugnant to Porto Rican legislators that a man should act as a lawyer before the same tribunal where he holds the highest office after the Judge: the office of the prosecuting attorney, who makes accusations against delinquents or against those who are beyond the pale of the law * * * The enemies of the People of Porto Rico, those who are pursuing it, those who are litigating against it, those who have suits against it, invite the lawyer Pettingill to associate himself with their hostility and to lead them in a lawsuit, more or less unjust, against Porto Rico. And Mr. Pettingill gladly agrees and brings suit against the People of Porto Rico for the collection of money or the establishment of some right. Shortly after the complaint is formulated, a voucher is filed away in the Department of the Auditor and in that it appears that the People of Porto Rico has paid the very salary which they oblige it to pay to the same man who, leagued with others, threatens it, opposes it, and forces it into a suit before taking part in which his salary ought to be returned. * * * The public opinion of the United States cannot, and ought not to, be deceived by causing the belief that puritanic scrupulosity prevails among us and that upright men dispense justice for us,

while there exists in Porto Rico a Federal Court in which an official performs his duties who is called a Prosecuting Attorney who formulates accusations before the court and brings suits against the People; and while the obligation rests upon the People of Porto Rico to pay that monster of *in*morality and that abuse of the People's patience.

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney for Porto Rico as aforesaid."

because for the reasons set — in paragraph I of this motion.

VIII.

In Paragraph 7 of the said rewritten Complaint, the words:

16 "and office"

in the third and fourth lines thereof, and the words

"and in respect of his official position as United States Attorney aforesaid"

in the two last lines of said rewritten complaint, and all of said Paragraph 7, as follows:

"That on the 7th day of June, A. D. 1906, the defendant, well knowing the premises but further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia," another certain false, scandalous, malicious and libelous article, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

"El señor Pettingill ya como fiscal, ya como abogado, ó ya como ambas cosas, no se atrevería á hacer en los Estados Unidos lo que esta impunemente realizando. Pero no importa que el se considere también impune en Puerto Rico. Ceda en su error. Los puertorriqueños no consentiran el abuso de su paciencia. Si ese hombre, fiscal y abogado a un mismo tiempo y ante el mismo tribunal, no resuelve por si mismo la dificultad y no da termino al escandalo que en el pais produce, será necesario que la protesta puertoriqueña haga conocer en Washington este nuevo abuso que con nosotros se comete."

which said words signified and meant in the English language as follows, that is to say:

"Mr. Pettingill, whether as prosecuting Attorney, as lawyer, or in both capacities, would not dare to do in the United States *States* what he is here accomplishing with impunity. But it makes no difference that he may consider himself also exempt from punishment

in Porto Rico. Let him desist from his error. The Porto Ricans will not consent to the abuse of their patience. If that man, prosecuting attorney and lawyer at the same time and before the same court, does not resolve the difficulty by his own act and does not put an end to the scandal which he is producing in the country, it will be necessary that the Portorican protest make known in Washington this new abuse which is being committed toward us."

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid."

for the reason set out in paragraph I of this motion.

IX.

In Paragraph 8 of said rewritten Complaint, the words:

17 "and office"

in the third line thereof, and the words:

"and in respect of his official position as United States Attorney as aforesaid,"

in the two last lines of said Paragraph 8, and all of said Paragraph 8, as follows:

"8. That on the 7th day of July, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia," another certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say:

"Y esos augurios de grandes pleitos hacen que un abogado ó representante ó defensor ó no sabemos que cósa de la tal compañía, tenga parlamentos con el Consejo y éste le escuche y le reconozca personalidad dentro de las leyes para dirigirse á el con una oficiosidad que nosotros consideramos completamente fuera de la ley. Pues, bien; ese abogado es el abogado Pettingill, un caballero norteamericano que es fiscal de una corte norteamericana y que considera que puede ejercer las funciones de fiscal, cobrarle un pingue sueldo al Tesoro de Puerto Rico, y ponerle pleitos al pueblo de Puerto Rico, injuriando, calumniando y menospreciando sus representaciones de gobierno.

which said words signified and meant in the English language as follows, that is to say:

"And these indications of important suits form the basis for a lawyer, or a representative, or defendant, or we know not what, of said Company to hold conferences with the Council, for the latter

to listen to him and recognize in him a personality within the laws sufficient for him to address himself out of place. Very well; that lawyer is lawyer Pettingill, a North American gentleman who is the Prosecuting Attorney of a North American court who thinks he can exercise the duties of prosecuting attorney, collect a large salary from the Treasurer of Porto Rico, and carry on suits against the People of Porto Rico, damaging, slandering, and making light of its governmental authority."

which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.

18 for the same rea-ons set out in Paragraph I of this motion.

X.

In Paragraph 9 of said rewritten Complaint, the words:

"and office"

in the third line thereof, and the words:

"and in respect of his official position as United States Attorney aforesaid."

for the same rea-ons as are set out in paragraph I of this motion.

XI.

That all of said Paragraph 9 of said rewritten complaint be stricken out because the same refers exclusively to acts and proceedings of and before a legislative body of the Government of Porto Rico, and hence are privileged and are not a subject of inquiry in a suit of this kind nor can the same be used or held to be an element of damage herein.

XII.

That all of Paragraph 10 of said rewritten complaint be stricken out because the same refers exclusively to acts and doings of the Executive Council of Porto Rico, a legislative body, in the exercise of its proper and legal functions, and to the acts and doings of the Executive Council of Porto Rico, in the lawful exercise of *his* functions of office and to the acts, doings and motives of the President of the United States in removing plaintiff from his office as United States Attorney for Porto Rico, all of which said matters are privi*l*edged and are not a proper subject of inquiry herein and none of which can be urged by plaintiff as an element of damage in this suit.

XIII.

That the first part of Paragraph II of said rewritten Complaint, as follows, to wit:

"That from the year 1900 to the 29th day of November, 1906, when he was summarily removed from office as a consequence of the malicious and libelous articles caused to be published by the defendant as hereinbefore alleged the plaintiff had continued to hold and

enjoy said office of United States Attorney for Porto Rico and the emoluments thereof and, but for said removal, would have
19 continued to receive said emoluments until the end of his term of four years, or until the 5th day of June 1908, at the rate of Four Thousand Dollars per year;"

be stricken out for the same rea-ons as are set out in paragraph I of this motion.

XIV.

That the following words contained in Paragraph 13 of said re-written Complaint, to wit:

"and that the removal of the plaintiff from said office of United States Attorney, resulting from said libelous articles of defendant as aforesaid, was published and circulated in the newspapers throughout the United States by the organization known as the "Associated Press," and thereby circulated from one end to the other of the United States to the further great damage of plaintiff in his feelings and reputation."

be stricken out for the same rea-ons as are set out in paragraph I of this motion and for the further reason that the acts and doings of said "Associated Press" organization are in no manner shown to be connected with defendant nor that he is responsible therefor in any manner *therefor*.

Whereof Defendant prays judgment and for the costs of this motion.

HENRY F. HORD,
Attorney for Defendant Manuel Zeno Gandia.

San Juan, P. R., Dec. 14th, 1908.

Demurrers to Rewritten Complaint Filed December 9th, 1908.

(Filed December 14th, 1908.)

Libel. Damages $50,000.

N. B. K. PETTINGILL, Plaintiff,
vs.
MANUEL ZENO GANDIA, Defendant.

20 Comes the Defendant and demurring to Plaintiff's rewritten Complaint filed herein on December 9th, 1908, says:

I.

That the said rewritten Complaint does not state facts sufficient to constitute a cause of action.

II.

That the said rewritten complaint is ambiguous, unintelligible and uncertain, and that (*a*) the same improperly mixes in inex-

tricable confusion with other so-called elements of damage alleged by plaintiff, the fact of his removal by the President of the United States from his office as United States Attorney for Porto Rico, whereas such removal and any loss resulting to Plaintiff because thereof cannot be urged by plaintiff herein as an element of damage without inquiring into the motives of the President in making said removal, a matter which under the rulings of the Court cannot be inquired into herein. (*b*) The same mixes also in -extricable confusion, with other so-called elements of damage to plaintiff, certain official acts and doings of the Executive Council of Porto Rico, and of the Governor of Porto Rico, which are in themselves privile*d*ged and are not a proper subject of inquiry herein nor constitute an element of damage which can be urged against the defendant herein. (*c*) That plaintiff herein, seeks, in part at least, to recover against defendant because of the fact that the "Associated Press," an organization with which defendant is not alleged or shown to be connected in any way, published the fact of his removal by the President of the United States from said office of United — Attorney for Porto Rico, in the exercise of his, the President's official duty and right.

Whereof defendant prays judgment and for his costs.

HENRY F. HORD,
Attorney for Defendant Manuel Zeno Gandia.

San Juan, P. R., Dec. 14th, 1908.

21 *Journal Entry.*

December 14, 1908.

Law. 467.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA,

and

Law. 548.

MANUEL ZENO GANDIA
vs.
N. B. K. PITTINGILL.

And now on this fourteenth day of December, 1908, this cause comes on for trial and the Court having heretofore ordered the pleadings entirely re-written, and portions of the same having only come in this morning, the Court examining the complaint, considers that there are references and matters contained therein which the Court heretofore refused to permit to be inserted therein, and therefore now strikes and erases from the re-written complaint in the

second, third and fourth lines of paragraph 11 thereof, the words, "as a consequence of the malicious and libelous articles caused to be published by the defendant hereinbefore alleged," and also the words, "But for said removal would have continued to receive said emoluments to the end of his term of four years," in lines six, seven, eight and nine of said same paragraph; and also in paragraph thirteen in lines five and six in like manner strikes therefrom the words, "the removal of the plaintiff from said office of United States Attorney resulting from," to which action of the Court the plaintiff by his attorneys then and there duly objects and excepts. The attorney for the defendant thereupon files a motion to strike certain parts of the said re-written complaint, and a demurrer to the same, which motions are then and there duly considered and overruled, to which action of the Court the defendant by his said attorney then and there objects and duly excepts, and the defendant by his said attorney immediately thereafter files his re-written answer
22 and cross-complaint, in the premises, but first, by leave of the Court in that behalf had and obtained, and owing to the striking by the Court itself of portions of the re-written complaint as above, erases from said re-written answer and cross-complaint certain portions thereof, in paragraphs four and five of the answer to make it conform to the re-written complaint as thus amended by the Court, all of which erasures appear on the said answer and cross-complaint as filed.

Thereupon the plaintiff by his said attorneys files his answer to the cross-complaint and pleads the local statute of limitations of one year against the cause of action therein stated, which plea is by the Court, after due consideration, overruled, to which action of the Court the plaintiff by his attorneys then and there objects and duly excepts. Whereupon counsel for the defendant requests leave to file a replication to the answer to the cross-complaint, which is granted, but counsel not having the same prepared owing to lack of time, it is by consent ordered that the same be considered as filed; and thus the cause being at issue, and the parties in person and by counsel as aforesaid all being present, the trial is proceeded with, and thereupon comes a jury, that is to say: Camilo Taboas, José Carrión, Pedro Santoni, Frank H. Beardsley, Luis Valdivieso, E. M. Amy, James Ramsey, José Llorens Delgado, Gustavo Fort, H. F. Besosa, Conrado Rivera, and H. N. Clarity, twelve good and lawful men chosen from the body of the District of Porto Rico, who are then and there duly sworn, examined, tried and impaneled to try the issue joined between the parties, and the taking of testimony is proceeded with, and the same not being finished at the adjournment hour, is continued over until Tuesday, December 15, 1908, the jury being permitted to separate in the meantime under strict and proper instructions from the Court as to their conduct regarding the case.

23 *Answer to the Rewritten Complaint Filed Herein on December 9th, 1908.*

(Filed December 14, 1908.)

N. B. K. PETTINGILL, Plaintiff,
vs.
MANUAL ZENO GANDIA, Defendant.

Libel.

Comes the defendant herein and answering to the rewritten complaint filed on December 9th, 1908, says:

I.

He denies the allegations contained in paragraph 3 of said rewritten complaint and says that the allegations therein contained are not true.

II.

This defendant denies all the allegations of fraud and malice contained in paragraphs 5, 6, 7, 8 & 9, of said rewritten complaint and also denies that he maliciously or otherwise intended by the publication of the articles in said Paragraphs 5, 6, 7, 8 & 9, set out, to injure Plaintiff in his good name and reputation, or to bring him into public scandal and disgrace, and denies that he published said articles falsely or maliciously or with intent to injure him in his reputation and office, and further denies that said articles or any part thereof, are false, scandalous, malicious or defamatory, and alleges that the portions of said articles set out in said paragraphs 5, 6, 7, 8 & 9 of said rewritten complaint are but excerpts from or parts of said articles as actually published; that said articles and each of them so published as aforesaid were so published by defendant in the discharge of his duty and trust to the patrons of said newspaper and to the public and in the exercise of his lawful
24 right of criticism as *as* a newspaper man of the official acts and doings of plaintiff as an Attorney and officer of this Court and as a public official to wit: United States Attorney for Porto Rico.

That plaintiff occupying as he did a dual position as an attorney-at-law and officer of this Court and as such prosecuting officer, his conduct in said capacities was and is a legal and just subject of reasonable criticism by said "La Correspondencia" and that no criticism was made of him in said articles, as a whole or separately, except such as was reasonable and in and concerning his acts as such attorney-at law, officer of this Court and United States prosecuting officer.

And defendant further says that the matters and things set out in said articles in which plaintiff is charged with improper and immoral conduct as an attorney-at-law and as such prosecuting officer, were justified and are justifiable and are and were based upon facts known at the time to defendant in and concerning the conduct of

plaintiff as such attorney-at-law, and prosecuting officer, and that that conduct consisted in accepting employment against his principal, the People of Porto Rico in both civil and criminal cases and in aiding, advising and assisting a person or persons charged with offenses against his principal, the People of Porto Rico, and in failing to report, as in duty bound, a case or cases to the Grand Jury of this Court for prosecution, and further, in a civil suit, in attacking in behalf of a personal client, the official acts of the People of Porto Rico, his principal.

III.

Defendant replying to the allegations contained in paragraph 10 of said rewritten Complaint, reiterates that whatever was published or printed by defendant in and concerning plaintiff and his connection with said case of A. L. Arpin versus "The Porto Rico Power & Light Company" was so done and published without malice on defendant's part and was so printed and published by de-
25 fendant in and concerning plaintiff in his official characters and as attorney-at-law and officer of this Court and as said United States Attorney for Porto Rico, and that whatever defendant so printed and published with reference to plaintiff and said case was justified and is justifiable and that defendant neither printed nor published anything in said connection which was not and is not true in substance.

Defendant further says that whatever he printed and published in said regard was so printed and published in the exercise of his right and duty to his patrons and to the public at large readers of said newspapers and it was a reasonable criticism of the public acts of defendant as such attorney-at-law and officer of this Court and United States District Attorney for Porto Rico.

Defendant further says that he had and has no manner of control over the deliberations, acts and doings of the said Executive Council, nor was he a member thereof nor responsible for its acts, doings or resolutions and cannot be charged with the same nor the result thereof and that if it should be true that said Executive Council did any of the things complained of by plaintiff herein, it and its members but not this defendant, are responsable, if any one is or can be so; that all of said acts and doings are privileged and the motives thereof cannot be inquired into in this cause.

IV.

Defendant, replying to the allegations contained in paragraph 11 of said rewritten complaint says:

He denies again that in the printing and publishing of any of said articles, he was actuated by spite or malice towards plaintiff.

Defendant further says that while it is true that during a part of the time that plaintiff was acting as such United States Attorney and holding said office, defendant was either the manager or director but not the owner of said newspaper "La correspondencia" and
26 that it is also true that not until about the 26th day of April, 1906, did defendant begin his legal and lawful criticism of

laintiff's official acts as aforesaid, yet defendant alleges the truth
be that said newspaper was and is being conducted exclusively in
ne Spanish language and was especially designed and intended to
e read by the Spanish speaking public in Porto Rico; that at that
me and prior thereto defendant did not understand or speak Eng-
sh and had no reporter who did; that he had not made any effort
ascertain plaintiff's course of official action either as a practicing
awyer or United States Attorney and that he was absolutely and
otally ignorant of and concerning the same, except that plaintiff
racticed in this Court and was United States Attorney and that he
ad had no business in said Court excepting only that several years
efore he had been sued in the Ponce Section of the Court for an
mount which he and others owed and to which suit *n*e made no de-
ense.

Defendant further says that his attention was first actively drawn
the conduct of the plaintiff as said attorney-at-law by an article
ublished in the Porto Rico Review in April 1906, concerning plain-
iff and certain matters in this court, and by the filing by plaintiff
gainst him and others of the grossly libellous and untrue and un-
ounded suit, at the instance of said Francisco Antongiorgi; that the
llegations contained in the Bill of complaint subscribed and filed
y plaintiff in said Antongiorgi suit were so false, insulting and
ibellous that he began to make inquiries of and concerning plain-
iff and what manner of man he was who could subscribe to such
alse and libellous statements, in the bona fide belief that plaintiff
ad been imposed on by his client, the said Francisco Antongiorgi
nd that so far as defendant has ever ascertained said Antongiorgi
id impose on plaintiff. Yet that, nevertheless, it is true then *then*
nd then only in the course of said investigations was the attention
of defendant drawn to the conduct of plaintiff in the conduct
27 of said office of United States Attorney and as attorney and
officer of this Court, and that thereupon Defendant conceived
t to be his duty as such newspaper man to reasonably criticise plain-
iff's official conduct, which he proceeded to do in said newspaper
ll as aforesaid.

Defendant denies plaintiff's allegation of lack of good faith or in-
ention or that he was actuated by motives of malice and revenge
gainst plaintiff in making said publications.

V.

Defendant denies each and all the allegations contained in para-
graph 12 of said rewritten complaint and says said articles were not
ublished with express or any other kind of malice toward plaintiff.

VI.

Replying to the allegations contained in paragraph 13 of said
rewritten complaint, defendant denies that said articles were or are
libellous and he specially alleges that this defendant is not and was
not connected therewith in any way or manner and that he was not
and is not responsible therefor.

VII.

Defendant further says that he published in said newspaper other articles than those referred to by plaintiff, bearing upon plaintiff's conduct as such attorney and officer—of the Court and United States Attorney; that said articles appeared in the following issues of said "La Correspondencia," to wit:

May 9th, 1906.
June 8th, 1906;
June 9th, 1906; and
October 6th, 1906,

and that each and all of them are true, were published in good faith, in the exercise of the Defendant's right of reasonable criticism of plaintiff's official acts and go to show and make complete, defendant's justifiable action in publishing the articles referred to by plaintiff.

28 Wherefore defendant prays judgment and for his costs.

HENRY F. HORD,
Attorney for Defendant, Manuel Zeno Gandia.

San Juan, P. R. Dec. 14th, 1908.

N. B. K. PETTINGILL, Plaintiff,
vs.
MANUEL ZENO GANDIA, Defendant.

Defendant's Cross-Complaint.

(Filed Together with Above Answer.)

Manuel Zeno Gandia, defendant in the original action herein, represented by his attorney Henry F. Hord, complains of N. B. K. Pettingill, plaintiff in the original action, and says:

I.

That defendant, Manuel Zeno Gandia, is a citizen and resident of Porto Rico and that plaintiff, said N. B. K. Pettingill, is an American citizen and resident of Porto Rico.

II.

That the defendant Manuel Zeno Gandia, being the husband of one of the daughters of Mrs. Angela Franceschi y Antongiorgi, now deceased, was appointed by the last will of the said Doña Angela Franceschi de Antongiorgi, as one of her executors; that thereafter, to wit: during the month of March, 1907, plaintiff herein, the said N. B. K. Pettingill, did wilfully, maliciously and with the intention of throwing discredit upon defendant and of bringing him into contempt and of dishonoring him in the eyes of the public and of this defendant's friends and associates, did falsely and maliciously publish and cause to be published and circulated in a paper in Porto Rico called "The Porto Rico Review" and did otherwise publish

and make public a certain false and malicious and defama-
29 tory article entitled "Letter from the Attorney General of the United States, and Judge Pettingill's Reply," in which said article among others, appears the following false malicious and defamatory allegations of and concerning this defendant:

"It took the Council six months to discover that such action on my part involved an alleged impropriety; and even then the discovery was made only under the whip lash of a Porto Rican editor whose only motive was personal animosity towards me because I had, in a suit brought by me as counsel for a private client, preferred a charge against said editor of having forged a last will and testament in favor of his wife for a share in an estate of large value. That the action of the Council was based upon the articles published in the newspaper belonging to the individual, and not at the instance of any party to the litigation, appears in their own records."

That in the publication aforesaid plaintiff, the said N. B. K. Pettingill, was actuated by express malice toward defendant, Manuel Zeno Ganida, and by motives of personal veng-ence and spite because of the fact that he had been removed as such United States Attorney and wrongfully believed that defendant was the cause thereof.

That the publication of said article and of said libel otherwise came to the knowledge of the defendant about the 15th day of March, 1907, and that by reason of such publication this defendant has been prejudiced in his reputation and in the esteem and confidence of the public and of his friends and he alleges that said publication was made maliciously and with the intent *of* injure him, defendant, and his damages by reason thereof amount to the sum of seventy five thousand dollars ($75,000).

That defendant herein having filed his action for libel against the plaintiff in the Insular Court in and for the District of San Juan, Porto Rico, on March 8th, 1908, plaintiff moved the removal of said action to the United States District Court for Porto Rico and that the said cause having been removed, and being pending in said United States District Court for Porto Rico, where this cause is pending it became, under the Practice Act prevailing in said Court
to reform plaintiff's petition, to consolidate said two actions
30 and present defendant's claims for damages as a Counter claim against plaintiff, which having been heretofore allowed by the Court is now done.

Wherefore, defendant prays as he has prayed above in his answer to said complaint that plaintiff take nothing by his said suit and further prays for judgment in the sum of seventy five thousand dollars ($75,000), attorneys' fees and costs of suit.

HENRY F. HORD,
Attorney for Defendant.

San Juan, P. R., Dec. 14, 1908.

31 *Answer to Cross-complaint.*

(Filed December 14, 1908.)

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

Comes now the plaintiff and for answer to the cross-complaint of the defendant in this suit says

I.

He denies each and every of the allegations in said cross-complaint contained, except the fact that a certain article was published in the "Porto Rico Review."

II.

He denies that he published or caused to be published said article in said "Porto Rico Review," but alleges that, if he had caused the same to be published, such publication would have been privileged.

III.

He *alles* that said cross-complaint was filed in this cause more than a year after the publication in said "Porto Rico Review" appeared, and hence that said alleged cause of action is barred by the statute of limitation of one year contained in Section 1869, paragraph 2, of the Civil Code of Porto Rico.

Wherefore this plaintiff prays for judgment in his favor upon said cross-complaint, for his reasonable attorneys' fees thereon and for his costs occasioned thereby.

WILLIS SWEET,
F. L. CORNWELL,
H. P. LEAKE,
Attorneys for Plaintiff.

32 *Journal Entry.*

December 16, 1908.

467.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

and

548.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

The trial of this cause is proceeded with as on yesterday, parties and counsel being present as before, and the jury having been first

called and all found present, and the taking of the evidence being concluded, the jury hears the arguments of counsel for the respective parties as well as the instructions of the Court, at the end of which instructions counsel for the defendant and cross-complainand asks leave to object to certain of the Court's instructions as thus given, which leave is then and there granted, and said counsel proceeds to state his objections at length in the presence of the Court and the Jury, to the Stenographer. Whereupon after said counsel has stated one or two of said objections, the Court informs him that it has made up its mind that it will not instruct the Jury in any other manner than as already instructed, and that his objections in that behalf are, and will be, overruled, but that the counsel may state them to the stenographer as a part of the record, but that the Jury must be permitted to retire in the meantime, to which action of the Court said counsel then and there objects and requests that the Jury be kept until he has stated all of his objections to the stenographer at length as he is doing, and the Court denies this request and orders that the Marshal take the Jury to its quarters for deliberation, which is then and there done, and as they are leaving the court-room said counsel requests leave to continue the stating of all of his objections to the instructions to the stenographer, which request is granted, and he then and there finished the stating of the same, to which action of the Court in refusing counsel
33 to state all of his objections at length in the presence and hearing of the Court and Jury, to the stenographer, as aforesaid before the Jury retired, said counsel for defendant and cross-complainant then and there duly objects and excepts. In like manner after the Court had finished delivering its instructions to the Jury, and before the Jury had retired, counsel for the plaintiff stated that he desired to object and except to some of the instructions given and refused, which request was then and there granted, he reserving the right to note his objections and exceptions specifically in the record.

Journal Entry.

December 17, 1908.

467. At Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

and

548. At Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

And now at eleven o'clock on this day, the jury retired in the above-entitled consolidated causes which retired at 5 P. M. yesterday

to consider of their verdict are, under order of the Court to the Marshal brought into open court in the presence of counsel for the respective parties, and after having been duly called and all found present, are asked by the Court whether or not they have agreed upon a verdict, to which they answer that they have not. The Court then asks them whether or not there is any reasonable probability of their being able to agree upon a verdict, to which they in like manner answer that they think there is not. The Court then asks them whether or not their failure to agree is owing to any lack of instructions on points of law by the Court, to which they answer "No." The Court then inquires whether or not they desire to hear any of the testimony read to them by the stenographer,
to which they in like manner answer "No." Whereupon the
34 Court, in the presence of counsel for the respective parties,
speaks to them as noted by the stenographer as to the desirability of agreeing upon a verdict, and states that it considers that its instructions have much simplified the case, and that it thinks there ought to be sufficient leeway as to their verdict to enable them to agree, and states that, as they have not been out an unreasonable length of time, they must retire again and see whether or not further deliberation may result in an agreement. They thereupon again retire in the custody of the Marshal, to which action of the Court none of the counsel for the respective parties enter any objection.

And thereafter, at five o'clock P. M. of this day, the same being six hours after the jury retired as last aforesaid, they again come into open court in the presence of counsel for the respective parties, and after having been duly called and all found present, return the following verdict, that is to say:

We, the jury, find for the plaintiff Pettingill, and assess his damages at the sum of Eight Thousand Dollars ($8,000).

H. N. CLARITY, *Foreman.*"

which said verdict is then and there ordered to be filed and entered of record, and a proper judgment will hereafter be entered thereon.

35 *Journal Entry.*

December 29, 1908.

467. At Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

In this cause the matter of the assessing of an attorney's fee under the statute having been heretofore submitted to the Court, it now being fully advised in the premises, assesses the same at the sum of Three Hundred Dollars ($300.00). Wherefore, in accordance with,

and in addition to, the verdict of the jury rendered herein under date of December 17, 1908, it is now:

Ordered and adjudged that the plaintiff N. B. K. Pettingill, do have and recover of and from the defendant Manuel Zeno Gandia, the sum of Eight Thousand Three Hundred Dollars ($8,300.00) together with interest on the sum of eight thousand dollars thereof, from said 17th day of December, 1908, until paid, and together with his costs in the premises to be taxed, and that execution issue therefor.

Petition for a Writ of Error and Supersedeas.

(Filed February 23, 1909.)

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

and

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Manuel Zeno Gandia, defendant in the above entitled cause, feeling himself aggrieved by the verdict of the jury, and the
36 judgment entered on the 29th day of December, 1908, comes now by Henry F. Hord, his attorney, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

HENRY F. HORD,
Attorney for Defendant, M. Zeno Gandia.

San Juan, P. R., February 23rd, 1909.

Assignment of Errors.

(Filed February 23, 1909.)

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

and

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Assignment of Errors on Writ of Error to the District Court of the United States for Porto Rico.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the District Court of the United States for Porto Rico erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to wit:

37 1. The Court erred in holding that the language set out in the said Complaint herein as that used by defendant Manuel Zeno Gandia toward and concerning plaintiff N. B. K. Pettingill was libelous *per se*.

2. The Court erred in overruling and denying the motion by defendant Manuel Zeno Gandia to strike from the rewritten Complaint of plaintiff N. B. K. Pettingill certain portions of the same to wit:—

I. In paragraph 2 thereof, the following: * * * "and also enjoyed the office and title of United States Attorney for Porto Rico and performed the duties of said office" * * *

II. In Paragraph 3 of said rewritten complaint the words: "and as such United States Attorney".

III. In Paragraph 5 of said rewritten complaint the words: "and office" in the seventh line thereof.

IV. In Paragraph 5 of said rewritten complaint, the words: "and in respect of his official position as United States District Attorney for Porto Rico as aforesaid" in the three last lines of said paragraph.

V. In paragraph 6 of said rewritten Complaint the words "and office" in the third line thereof, and the words "and in respect of his official position as United States Attorney as aforesaid"; in the two last lines of said paragraph 6 of said Complaint.

VI. All of said Paragraph 6 of said rewritten complaint, as follows:—"6. That on the 28th day of April, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace falsely and maliciously did compose and publish, and cause to be

composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious, and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say: 'Es evidente que la legislatura de Puerto Rico considera una inmoralidad que el Fiscal de una corte ejerza su profesión de abogado ante la misma corte de la cual es funcionario. Y es evidente tambien que el poder legislativo de la isla está ilegalmente contrariado por el abogado señor Pettingill quien fundado en derechos que este pueblo desconoce, si es que existen, está ejerciendo en una corte fundada en Puerto Rico por el Gobierno de los Estados Unidos dos funciones incompatibles, la de fiscal y la de abogado en ejercicio ante esta Corte' which said words signified and meant in the Legislature of Porto Rico considers it immoral that the
38 Prosecuting Attorney of a court should excerise his profession as a lawyer before the same court of which he is a functionary. And it is also evident that the legislative power of the island is il-egally opposed by the lawyer Mr. Pettingill who, claiming rights of which this country is ignorant, if indeed they exist, is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that Court,' which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid".

VII. All of Paragraph 5 of said rewritten Complaint as follows: "5. That on the 26th day of April, A. D. 1906, the defendant, well knowing the premises but wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff in his said profession and office, in defendant's said newspaper called "La Correspondencia" a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false scandalous, malicious and libelous matters following, of and concerning the plaintiff, that is to say: 'Las leyes de Puerto Rico prohiben que un abogado pueda á un mismo tiempo desempeñar el cargo de fiscal de una corte y ejercer su profesión. ?Y por qué tal ley ocurrió á nuestra legislatura? Pues, porque las leyes se inspiran en principios de moral y es una inmoralidad, que fué sin duda repugnante á los legisladores puertoriqueños, que un hombre ejerza como abogado ante le mismo tribunal en donde desempeña el más alto cargo después del Juez: el cargo de fiscal que acusa á los delicuentes ó á los que están fuera de la ley. * * * Los enemigos del Pueblo de Puerto Rico, los que lo persiguen, los que contra él lit-gan, los que le ponen pleitos, invitan al abogado Pettingill á asociarse á su enemistad y á conducirlos á un litis más ó menos injusto en contra de Puerto Rico. Y el Señor Pettingill accede gustoso y demanda al Pueblo de Puerto Rico en cobro de pesos ó en reclamación de derechos. Poco

después de formulada la demanda, un "voucher" es archivado en el departamento del Auditor y en aquel consta que el Pueblo de P-orto Rico ha pagado exactamente el sueldo que le obligan á pagar al mismo hombre que aliado con otros le conmina, le combate y le empuja á un pleito para entrar en el cual debiera antes devolverse el sueldo. * * * No se puede, no se debe engañar la opinión pública de los Estados Unidos, haciéndola creer que puritana pulcritud nos rige y que hombres de rectitud nos hacen justicia, mientras haya en Puerto Rico una Corte Federal en la cual actúa un funcionario que se llama Fiscal que acusa ante la Corte y pleitea contra el Pueblo; y mientras se obligue al Pueblo de Puerto Rico á pagra esa monstruosa *in*moralidad y ese abuso de su paciencia,' which said words signified and meant in the English language as follows, that is to say: 'The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of prosecuting attorney of a court, and to exercise his profession. And why did such a law occur to our legislature? For the reason that laws are inspired by principles of morality and it is an immorality which was without doubt repugnant to Portorican legislators that a man should act as a lawyer before the same tribunal where he holds the highest office after the Judge: the office of the
39 prosecuting attorney, who makes accusations against delinquents or against those who are beyond the pale of the law. * * * The enemies of the People of Porto Rico, those who are pursuing it, those who are litigating against, those who have suits against it, invite the lawyer Pettingill to associate himself with their hostility and to lead them in a lawsuit, more or less unjust, against Porto Rico, and Mr. Pettingill gladly agrees and brings suit against the People of Porto Rico for the collection of money or the establishment of some right. Shortly after the complaint is formulated, a voucher is filed away in the Department of the Auditor and in that it appears that the People of Porto Rico has paid the very salary which they oblige it to pay to the same man who, leagued with others, threatens it, opposes it, and forces it into a suit, before taking part in which his salary ought to be returned. * * * The public opinion of he United States cannot, and ought not to, be deceived by causing the belief that puritanic scrupulosity prevails among us and that upright men dispense justice for us, while there exists in Porto Rico a Federal Court in which an official performs his duties who is called a Prosecuting Attorney who formulates accusations before the court and brings suits against the People; and while the obligation rests upon the People of Porto Rico to pay that monster of immorality and that abuse of the People's patience,' which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an Attorney at law and in respect of his official position as United States Attorney for Porto Rico as aforesaid.

VIII. In Paragraph 7 of the said rewritten Complaint, the words: "and office" in the third and fourth lines thereof, and the words, "and in respect of his official position as United States Attorney aforesaid" in the two last lines of said rewritten complaint, and all

of said Paragraph 6, as follows: "That on the 7th day of June, A. D. 1906, the defendant, well knowing the premises but further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia", another certain false, scandalous, malicious and libelous article, containing (among other things) the false, scandalous, malicious and libelous matters, following, of and concerning the plaintiff, as aforesaid, that is to say: "El Señor Pettingill, ya, como fiscal, ya como abogado, ó ya como ambas cosas, no se atrevería á hacer en los Estados Unidos lo que está impunemente realizando. Pero no importa que él se considere también impune en Puerto Rico. Ceda en su error. Los puertoriqueños no consentiran el abuso de su paciencia. Si ese hombre, fiscal y abogado á un mismo tiempo y ante el mismo tribunal, no resuelve por si mismo la dificultad y no dá termino al escándalo que en el pais produce, será necesario que la protesta puertorriqueña haga conocer en Washington este nuevo abuso que con nosotros se comete", which said words signified and meant in the English language, as follows, that is to say: 'Mr. Pettingill, whether as Prosecuting Attorney, as lawyer, or in both capacities would not dare to do in the United States what he is here accomplishing with impunity. But it makes no difference that he may consider himself also exempt from punishment in Porto Rico. Let him desist from his error. The Porto ricans will not consent to the abuse of their patience. If that man, prosecuting attorney and lawyer at the same time and before the same court, does not resolve the difficulty by his own act and does not put an end to the scandal which he is producing in the country, it will be necessary that the Porto rican protest make known in Washington this new abuse which is being committed toward us.' Which said words, so quoted and translated as aforesaid, were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid".

IX. In paragraph 8 of said rewritten Complaint, the words: "and office" in the third line thereof, and the words: "and in respect of his official position as United States Attorney as aforesaid", in the two last lines of said Paragraph 8, and all of said Paragraph 8, as follows: "8. That on the 7th day of July, A. D. 1906, the said defendant, further wickedly and maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation, and to bring him into public scandal and disgrace, falsely and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff as aforesaid, in defendant's said newspaper called "La Correspondencia" another certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious and libelous matters following, of and concerning the plaintiff as aforesaid, that is to say: 'Y esos augurios de grandes pleitos hacen que un abogado

ó representante ó de fensor ó no sabemos que cosa de la tal compañía, tenga parlamentos con el Consejo y éste le escuche y le reconozca personalidad dentro de las leyes para dirigirse á él con una oficiosidad que nosotros consideramos completamente fuera de la ley. Pues bien: ese abogado es el abogado Pettingill, un caballero norteamericano y que considera que puede ejercer las funciones de fiscal, cobrarle un pingue sueldo al Tesoro de Puerto Rico, y ponerle pleitos al Pueblo de Puerto Rico, injuriando, calumniando y menospreciando sus representaciones de gobierno." Which said words signified and meant in the English language as follows, that is to say: 'And these indications of important suits from the basis for a lawyer, or a representative, or defender, or we know not what, of said Company to hold conferences with the Council, for the latter to listen to him and recognize in him a personality within the laws sufficient for him to address himself out of place. Very well; that lawyer is lawyer Pettingill, a North American gentleman who is the Prosecuting Attorney of a North American court who thinks he can exercise the duties of prosecuting attorney, collect a large salary from the Treasurer of Porto Rico, and carry on suits against the People of Porto Rico, damaging, slandering and making light of its governmental authority.' which said words, so quoted and translated as aforesaid were written and published of the plaintiff in respect of his profession and business as an attorney at law and in respect of his official position as United States Attorney as aforesaid.'

X. In paragraph 9 of said rewritten Complaint, the words: "and office" in the third line thereof, and the words: "and in respect of his official position as United States Attorney aforesaid."

XI. All of said Paragraph 9 of said rewritten Complaint.

41 XII. All of Paragraph 10 of said rewritten complaint.

XIII. The first part of Paragraph 11 of said rewritten complaint, as follows, to wit: "That from the year 1900 to the 29th day of November, 1906, when he was summarily removed from office as a consequence of the malicious and libelous articles caused to be published by the defendant as hereinbefore alleged the plaintiff had continued to hold and enjoy said office of United States Attorney for Porto Rico and the emoluments thereof, and but for said removal, would have continued to receive said emoluments until the end of his term of four years, or until the 5th day of June 1908, at the rate of Four Thousand Dollars per year;"

XIV. The following words contained in Paragraph 13 of said rewritten Complaint, to wit: "and that the removal of the plaintiff from said office of United States Attorney, resulting from said libelous articles of defendant as aforesaid, was published and circulated in the newspapers throughout the United States by the organization known as the 'Associated Press', and thereby circulated from one end to the other of the United States to the further great damage of plaintiff in his feelings and reputation."

3. The Court erred in overruling the demurrers by defendant Manuel Zeno Gandia to the rewritten complaint of plaintiff N. B. K. Pettingill as follows:

I. That the said rewritten Complaint does not state facts sufficient to constitue a cause of action.

II. That the said rewritten complaint is ambiguous, unintelligible and uncertain, and that (*a*) the same improperly mixes in inextricable confusion with other so called elements of damage alleged by plaintiff the fact of his removal by the President of the United States from his office as United States Attorney for Porto Rico, whereas such removal and any loss resulting to plaintiff because thereof cannot be urged by plaintiff herein as an element of damage without inquiring into the motives of the President in making said removal, a matter which under the rulings of the Court cannot be inquired into herein. (*b*) The same mixes also in -extricable confusion with other so called elements of damage to plaintiff, certain official acts and doings of the Executive Council of Porto Rico, and of the Governor of Porto Rico, which are in themselves privileged and are not a proper subject of inquiry herein nor constitute an element of damage which can be urged against the defendant herein. (*c*) That plaintiff herein, seeks, in part at least, to recover against the defendant because of the fact that the Associated Press, an organization with which defendant is not alleged or shown to be connected in any way, published the fact of his removal by the President of the United States from said office of United States Attorney for Porto Rico, in the exercise of his, the President's official duty and right.

4. The Court erred in overruling and denying defendant Manuel Zeno Gandia's motion for a continuance herein, filed on December 12th, 1908.

42 5. The Court erred in admitting in evidence the document published on June 8th, 1906 (Exhibit D. for plaintiff N. B. K. Pettingill) and that of June 9th, 1906 (Exhibit E. for plaintiff N. B. K. Pettingill).

6. The Court erred in permitting plaintiff N. B. K. Pettingill (a witness in his own behalf) to answer, over the objection of defendant, Manuel Zeno Gandia, the following question (the answer thereto following): "Q. What action if any did the Executive Council take with reference to the articles (Exhibits A to G plaintiff, both inclusive) that have just been presented? A. I simply know by obtaining a certified copy which counsel has in his hand", and in admitting in evidence, also over the objection of defendant Manuel Zeno Gandia, two certain documents, collectively marked as "Exhibit H. for plaintiff", being certified copies of portions of two meetings of Executive Council of Porto Rico, held on October 4th, 1906, and October 5th, 1906, respectively.

7. The Court erred in admitting in evidence, over the objection of defendant Manuel Zeno Gandia, the document marked "Exhibit I for plaintiff".

8. The Court erred in allowing plaintiff (a witness in his own behalf) to answer the following question (the answer follows):

"Q. State when you were removed from office. A. By cable received on the 29th day of November 1906. That being Thanksgiving morning."

9. The Court erred in allowing plaintiff (when a witness in his

own behalf) to answer, over the objection of defendant the following question (the answer follows):

"Q. What do you know relative to the circulation of these matters in the U. S. because of this publication?

"A. Well, I know that some of my friends in the States afterward inquired about it, a number of them having seen it in the Press dispatches. I want to explain my answer. I don't want to be put in the attitude of misstating the matter. The question asked was about matters in general. I have no knowledge and I want to state it distinctly, that these articles independently of what resulted from them were circulated in the United States. I cannot say that
43 I have ever seen a newspaper that made a distinct reference to these articles except coupled with the result of it.

10. The Court erred in admitting in evidence, over the objection of the defendant the two items from the "Correspondencia" collectively marked "Exhibit J. for plaintiff".

11. The Court erred in allowing plaintiff (when testifying as a witness in his own behalf) over the objections of defendant, to answer the following question (the answer follows):

"Q. What have you to say as to the right of a United States attorney or a prosecuting attorney to practice in the United States his profession in private matters?

"A. The question of his right to do so is of course a question of law, but I have never known it to be doubted so far as any state of the United States is concerned. I have had more or less knowledge of the customs of United States attorneys in regard to taking and carrying on private business in at least five districts in different States, or four and the District of Columbia, and in all of those it has been the unvarying custom, as far as my knowledge goes,—at least it was the custom at the time I had the knowledge—that the United States attorneys took private practice as a matter of course; in fact that was the only reason which attracted to that office an able class of practitioners, who would not have given up a private practice for the sake of it. I might add in explanation of that remark that this situation is practically parallel to that in the District of Columbia, where there is a United States attorney and an attorney representing the district, one being appointed by the President of the United States and the other being appointed by whatever may be the proper authority in the district. And my investigations gave me knowledge of the fact that that United States attorney not only practiced privately, but practiced in cases in which the interests of the District of Columbia are directly involved on the other side..

12. The Court erred in rejecting as evidence the document offered by defendant marked "Exhibit D" for defendant, the same being a certified copy of an affidavit by plaintiff filed in the Insular District Court of San Juan in the case of Dix v. Kent, which affidavit referred to certain proceedings in the criminal case of the People of Porto Rico v. James E. Kent."

13. The Court erred in refusing to allow the plaintiff, N. B. K. Pettingill (when testifying as a witness for defendant) to answer the following question put to him by defendant's counsel:

44 "Q. Did not the action of Judge McKenna consist in soliciting money from a litigant in the course of a case?"

14. The Court erred in refusing to allow defendant, Manuel Zeno Gandia, to introduce in evidence a certified copy of the proceedings in the Insular District Court at Ponce showing the outcome of a suit filed by plaintiff as one of the Attorneys for Francisco Antongiorgi against defendant (among others) charging forgery of a will (Exhibit F. for defendant).

15. The Court erred in refusing to give instruction No. 1 requested by defendant as follows:

"1. The jury are instructed that the charge contained in the letter by plaintiff to the Attorney general, published in the Porto Rico Review and shown to Messrs. Leake and Bothwell is libelous per se and the law implies malice from the publication thereof and presumes damage to the person against whom it was directed.

16. The Court erred in refusing to give instruction No. 2 requested by defendant as follows:

"2. A publication within the meaning of the law is the showing of the libelous article to a person or persons other than the person against whom the article is directed.

17. The Court erred in refusing to give instruction No. 3 requested by defendant as follows:

"3. If the jury should believe that the letter to the Attorney General by plaintiff was shown by said Pettingill to said other persons or that he consented to its publication in the Review then the jury must return a verdict on the cross-complaint in favor of defendant Manuel Zeno Gandia for such an amount as they think he has reasonably suffered by reason of said charge, but not to exceed $75,000.00.

18. The Court erred in refusing to give instruction No. 4 requested by defendant as follows:

"4. The jury are further instructed that if *defendant* has been shown to have had actual malice in the publication of said letter then defendant may recover exemplary damages or smart money but in no event to exceed the amount claimed by defendant in his cross-complaint."

19. The Court erred in refusing to give instruction No. 5 requested by defendant as follows:

45 "5. The jury are instructed that if they believe that defendant has established a preponderance of evidence herein the truth of the matters contained in the articles in the "Correspondencia" then they must find the defend-nt on the main complaint."

20. The Court erred in refusing to give instruction No. 6 requested by defendant as follows:

"6. In this case the Articles in the "Correspondencia" were directed against the plaintiff in his official capacity and hence the jury are instructed that the truth is a defense and if the defendant has established said truth he is entitled to a verdict on the main case.".

21. The Court erred in refusing to give instruction No. 7 requested by defendant as follows:

"7. The official acts of the plaintiff Mr. N. B. K. Pettingill were subject to reasonable criticism on the part of defendant Manuel Zeno Gandia and hence if the defendant went no further that that in said articles then such criticism cannot be shown to indicate malice on the part of defendant."

22. The Court erred in refusing to give instruction No. 8 requested by defendant as follows:

"8. The jury are instructed that in judging of the intention of defendant Manuel Zeno Gandia, in publishing said articles in the "Correspondencia", — may take into consideration the local news and customs in Porto Rico at and prior to the American intervention and since, governing other prosecuting Officers in Porto Rico, and can take into consideration the training of defendant and the public sentiment in Porto Rico in the matter of Prosecuting Officers practicing in other cases and taking cases against the Government of Porto Rico."

23. The Court erred in charging the jury in effect that plaintiff was a federal officer, said portions of said charge being as follows:

"For this reason, as you have seen, it may be possible that a wholly unwarranted idea has arisen in the minds of some people, that the Island and not the Nation is sustaining this court, although this court as to its jurisdiction and in every other respect is absolutely independent of every official and tribunal of this Island, and takes orders from no official or department connected with the local government, but exercises the jurisdiction of a circuit and district court of the United States and additional jurisdiction as well that is specially given *by* it by Congress as fully to all intents and purposes as does any circuit or district court of the United States in any State of the Union.

In fact Porto Rico is organized more like a state than are the other territories of the nation with the exception of Hawaii. Congress by the Foraker Act created a complete system of Government
46 for this Island with a Governor, a Legislature and a complete judicial system of its own which are three coordinate branches of the local government and are as separate from each other save for the peculiar position of the Executive Council as is the case in a state, and the national judicial authority, as in the States; is wholly separated from the local government by the creation of this Court and the appointment of a Judge and a United States Attorney for the Island.

It may be added here, gentlemen, that save for the apparent incongruity or we might say for lack of a better word, save for the apparent humiliation of a national court having to receive its money at the hands of local officials who audit its accounts, there is no difficulty about this financial arrangement regarding the court, and save for some friction which has now happily passed, the court has managed to get along very smoothly with the insular officials and they exhibit no desire to hamper it in any way regarding its work or its jurisdiction. This in short is the position of this Court without reference to what the opinion of any individual or editor to the contrary may be. This statement is made to you, gentlemen, so as to

enable you to understand the situation with reference to the facts in this case.

24. The Court erred in charging the jury as follows:

"There is nothing in the law of the United States express or implied,—and in fact the custom has been to the contrary—that would prevent a District Attorney of the United States from engaging in the general practice of the law in the State where his district is, whenever his employment does not conflict with *with* his duties as District Attorney of the United States, and when it is not prevented by local rules of court or express local statute."

25. The Court erred in charging the jury as follows:

"Therefore you are instructed that it involves no moral turpitude and there was no legal wrong denounced by law, in the action of Judge Pettingill in practicing law locally in the Island of Porto Rico at the times and in the manner in which the evidence tends to show, and he himself admits he did practice."

26. The Court erred in charging the jury as follows:

"Of course gentlemen, there are some things in which every person must be the judge of the propriety of his own conduct or action and if he chooses to do a thing that is not prohibited by law, which another thinks he ought not to do, such fact does not justify that other person in lebelling him therefor. Judge Pettingill had a right under the law and subject to the possible approval or disapproval of the Attorney General or President of the United States to choose for himself as to whether or not he would take cases as a practicing lawyer in Porto Rico, where the local Government of the people of the island was the prosecutor or the defendant.

27. The court erred in charging the jury as follows:

"You are instructed, genetlemen, that while the law of Porto Rico provides that, when a public employé is libeled and the libel refers to acts con-ected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges; this means that he must prove that the acts which he criticized and with reference to which he libeled a plaintiff, were wrong in law and not that they were wrong in the opinion of the person who commits the libel, or others, and whenever a person who has libeled another, justifies and attempts to prove the truth thereof in law, if he fails to so so, that fact may be considered as aggravation of the damages that may be awarded by the jury."

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28. The Court erred in charging the jury as follows:

"But you are instructed gentlemen, that in this case the publication by defendant Manuel Zeno Gandia, in La Correspondencia, of the several articles that have been read to you, regarding plaintiff Pettingill, when taken as a whole have been hold by this Court to be and you are instructed that they are what is known in law as libelous per se, that is that they contain language with reference to the plaintiff that affects him in his office as United States Attorney. in such a manner as that the person libelled has a cause of action against the person who made the publication and malice in the writer is presumed in law."

29. The Court erred in charging the jury as follows:

"Therefore, in any event, you must find for the plaintiff upon that issue and give him such damages as you may believe from all the facts and circumstances in the case he is entitled to."

30. The Court erred in charging the jury as follows:

"* * * and unless you believe from a preponderance of the evidence that said Pettingill after the matter was all over and he had made this report to the Attorney General, that he unnecessarily and with direct intention and malice against the defendant Gandia, showed copies of his report containing such libel to others than his partners, or published the same unnecessarily in the Porto Rico Review, and the burden of proving this is on Gandia by a preponderance of the evidence, then the defendant Gandia has no cause of action at all against Pettingill and the cross-complaint would be in such case entirely eliminated from this action."

31. The Court erred in charging the jury as follows:

"* * * but if you shall believe from a preponderance of the evidence that any showing of the said report or answer by the said Pettingill to his partner or others after the matter was all over as aforesaid, and any publication of the same was done without malice upon the part of the said Pettingill, then and in such case and in like manner the cross-complaint must be eliminated from the cause entirely, because as the communication of Pettingill to the Attorney General was not written in malice in the first place, but was in law privileged then malice cannot be presumed in its favor afterwards, and the burden is upon Gandia to show such malice by a preponderance of the evidence."

32. The Court erred in not permitting defendant to note his exception to those portions of the charge contained in Assignments of Error Nos. 23 to 31, both inclusive, before the jury retired to consider of their verdict.

33. The Court erred in refusing to allow defendant an
48 exception to its refusal to allow defendant to note his exception to the giving of those portions of the Court's charge set out in Assignments of Error Nos. 23 to 31, both inclusive.

Wherefore, for these and other manifest errors appearing in the record, the said Manuel Zeno Gandia, plaintiff in error, prays that the judgment of the said District Court of the United States for Porto Rico be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting him his rights under the statutes and laws of the United States, and plaintiff in error, also prays judgment for his costs.

HENRY F. HORD,
Attorney for Manuel Zeno Gandia,
Plantiff in Error.

(Filed February 23, 1909.)

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and

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Order Allowing Writ of Error.

At a stated term, to wit, the October term, A. D. 1908, of the District Court of the United States of America for Porto Rico, held at the 23rd day of February, in the year of our Lord one thousand nine hundred and nine.

Present, the Honorable B. S. Rodey, District Judge.

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Upon motion of Henry F. Hord, Esq., attorney for defendant, and upon filing a petition for a writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein.

B. S. RODEY, *Judge.*

San Juan, P. R., February 23rd, 1909.

(Filed February 23rd, 1909.)

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Order Fixing the Amount of Supersedeas Bond on Writ of Error.

The defendant, Manuel Zeno Gandia, having this day filed his petition for a writ of error from the decision and judgment thereon

made and entered herein, to the Supreme Court of the United States
together with an assignment of errors within due time, and also
praying that an order be made fixing the amount of security, which
defendant should give and furnish upon said writ of error, and
that further proceedings herein be suspended and stayed
50 until the determination of said writ of error by said Supreme
Court of the United States, and said petition having this day
been duly allowed:

Now, therefore, it is ordered, that upon the said defendant, Manuel
Zeno Gandia, filing with the Clerk of this Court a good and sufficient
bond in the sum of twelve thousand dollars ($12,000.00), to the
effect, that if the said defendant, Manuel Zeno Gandia, plaintiff in
error, shall prosecute the said writ of error to effect, and answer all
damages and costs if he fails to make his plea good, then the said
obligation to be void; else to remain in full force and virtue, the
said bond to be approved by the Court that all further proceedings
in this court be, and they are hereby suspended and stayed until
the determination of said writ of error by the said United States
Supreme Court.

B. S. RODEY, *Judge.*

Dated February 23rd, 1909.

(Filed March 3, 1909.)

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Supersedeas Bond.

Know all men by these presents, that we, Manuel Zeno Gandia
as principal and Eduardo Georgetti and Luis Rubert, as sureties, are
held and firmly bound unto the said N. B. K. Pettingill, his certain
attorneys, executors, administrators, or assigns, in the full and just
sum of twelve thousand dollars to be paid to the said N. B. K. Pet-
tingill his attorneys, executors administrators or assigns, to
51 which payment well and truly — be made, we bind ourselves
our heirs, executors and personal representatives jointly and
severally, firmly by these presents.

Sealed with our seals and dated this third day of March in the
year of our Lord one thousand nine hundred and nine.

Whereas, lately at a session of the District Court of the United
States for Porto Rico in a suit pending in said Court between N. B.
K. Pettingill plaintiff, and Manuel Zeno Gandia, defendant, a final
judgment was rendered against the said defendant, and the said

Manuel Zeno Gandia, defendant, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said N. B. K. Pettingill is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington, D. C.

Now, the condition of the above obligation is such, that if the said Manuel Zeno Gandia shall prosecute his writ of error to effect and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

M. ZENO GANDIA.

EDUARDO GEORGETTI.
LUIS RUBERT.

ISLAND OF PORTO RICO,
City of San Juan.

On this date personally appeared before me, Andrés B. Crosas, Notary Public for Porto Rico, at San Juan, P. R. Mr. Eduardo Georgetti, known to me to be the person whose name is subscribed to the foregoing bond, who being duly sworn by me, acknowledged and testified under oath that he executed the same freely and voluntarily and that he is worth over and above his just debts and
52 liabilities the sum of twelve thousand dollars in real property situated in Porto Rico.

EDUARDO GIORGETTI.

Subscribed and sworn to before me by Eduardo Giorgetti, personally known to me and known to me to be the person described hereinbefore on this third day of March, 1909.

[NOTARIAL SEAL.] ANDRES B. CROSAS,
Notary Public.

Regt. at Numb. 204.

ISLAND OF PORTO RICO,
City of San Juan.

On this day personally appeared before me, Andrés B. Crosas, Notary Public for Porto Rico, at San Juan, P. R. Mr. Luis Rubert, known to me to be the person whose name is subscribed to the foregoing bond, who being duly sworn by me, acknowledged and testified under oath that he executed the same freely and voluntarily and that he is worth over and above his just debts and liabilities the sum of twelve thousand dollars in real property situated in Porto Rico.

LUIS RUBERT.

Subscribed and sworn to before me by Luis Rubert, personally known to me and known to me to be the person described hereinbefore, on this third day of March, 1909.

[NOTARIAL SEAL.] ANDRES B. CROSAS,
Notary Public.

Regt. at numb. 204

Approved as to sufficient in form and substance this March 3, 1909 and accepted and ordered to be filed.

B. S. RODEY, *Judge.*

53 *Journal Entry.*

March 24, 1909.

560. Law.

BELÉN REQUENA DE MOLINA
vs.
THE SAN JUAN LIGHT & TRANSIT CO.

and

467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA.

Order.

In the above entitled causes, it being probable that the Court will not be present on the date fixed for the signing of the Bill of Exceptions herein, the time to do the same is hereby extended until on or before the tenth (10) day of May, 1909, or the further order of the Court.

(Signed) B. S. RODEY, *Judge.*

Journal Entry.

May 8, 1909.

467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

548. Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Comes now Henry F. Hord, counsel for the defendant and cross-complainant, Manuel Zeno Gandia, and presents to the Court for its signature and approval a bill of exceptions herein. N. B. K. Pet-

tingill pro se for the plaintiff and cross-defendant acquiesces in open court to the same. The court having examined said tendered bill of exceptions settles, signs, approves, and orders the same filed, but with its own statement and record added thereto regarding the occurrences at the close of the trial before the jury.

54 *Motion for Extension of Time.*

(Filed May 19, 1909.)

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Comes the defendant herein, Manuel Zeno Gandia, and represents to the Court that owing to the unavoidable delays caused by the absence of Counsel, it became necessary to ask from the Court an extension of the time within which to settle the Bill of Exceptions but that the same has now been done and was settled on the 10th day of May, 1909, but that said delay makes it necessary to extend the time for file the record of this Court in the Supreme Court of the United States.

Wherefore, defendant prays the Court to make an order extending such time until the 1st. day of July, 1909 and etc.

HENRY F. HORD,
Attorney for Defendant.

San Juan, P. R., May 19th, 1909.

Journal Entry.

May 19, 1909.

467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

548. Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Upon motion of Henry F. Hord, counsel for the defendant and cross-complainant in the above-entitled causes, the time is extended

to July the first, 1909, in which the transcript of the record in this cause may be filed in the Honorable the Supreme Court of the United States.

55 In the District Court of the United States for Porto Rico, Sitting at San Juan.

Law. No. 467.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

Law. No. 548.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

Bill of Exceptions.

Be it remembered, that on the 29" day of December, 1908, the above entitled causes, having theretofore been consolidated by order of the Court, came on for trial before the above Court and a jury duly impanelled. The Hon. Bernard S. Rodey, presiding. N. B. K. Pettingill, hereinafter styled plaintiff, appearing by Willis Sweet, Esq., F. L. Cornwell, Esq. and Harry P. Leake, Esq., and Manuel Zeno Gandia, herinafter styled defendant, appearing by Henry F. Hord, Esq., and the following proceedings were had, to wit:—

The plaintiff, to prove the issues in his behalf, was called in his own behalf, and being duly sworn testified, as follows:

Direct Examination:

"My name is N. B. K. Pettingill and my age forty-five years. On the 26th day of April, 1906, I resided in San Juan, where I have lived since the beginning of 1899, possibly a little earlier, and had practiced law since the year 1900 and from that year had also held the office of United State attorney for this district.

I was admitted to the bar of Suffolk County, Boston, Massachusetts, in January, 1888. I practiced law for ten years in the State of Florida, being a member of the state courts and of the
56 federal court of that district and of the court of appeals for the fifth circuit. In the latter part of 1898, I came to Porto Rico on a visit, which was extended into the early part of 1899. In 1897, or 1896, I was admitted to the Supreme Court of the United States and have practiced there since that time, have had various cases there, and have, since my arrival here, practiced in all the courts or been qualified to practice in all the courts of the Island and this Court.

When I came to Porto Rico, as I spoke no Spanish at that time and there were no courts here conducted in the English language, I had no active practice. I spent my time in becoming acquainted and in looking into the local laws, etc., and during that winter and the following year beginning with the first of July, 1899 and ending with the first of May, 1900, I had the honor to hold the position of the law judge of the United States Provisional Court under the military Government, and, as that court held terms in at least five or six places on the Island and repeatedly in the three cities of Ponce, San Juan and Mayaguez, I formed a relatively large acquaintance among the inhabitants, among the Porto Ricans, Spaniards and Germans, all elements on the Island. So far as the United States is concerned, I have lived in two communities. I was born and raised in the State of Maine and at the age of twenty-one I went to Florida, where I lived until I came here, a matter of some fourteen years, and as I practiced all over the State of Florida, obtained a large acquaintance there. Through my attending frequently the terms of the Supreme Court and through my position as United Stafes Attorney, I acquired an extensive acquaintance in Washington, and through that and through other business interests, in New York. I am the plaintiff in this action."

Exhibit "A" for plaintiff was handed to witness for identification.

"This is a copy of La Correspondencia de Puerto Rico of date April 26th, I think that is, 1906, and an extract from that article is set forth in the complaint."

57 The said document was placed in evidence, marked Exhibit "A" for plaintiff and read to the jury by counsel, as follows:

58 EXHIBIT A FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," April 26, 1906.

Immorality.

The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of a prosecuting attorney of a court and to exercise his profession. And why did such a law occur to our Legislature? For the reason that laws are inspired by principles of morality, and it is an immorality which was without doubt repugnant to Porto Rican legislators that a man should act as a lawyer before the same Tribunal where he holds the highest office after the Judge; the office of Prosecuting Attorney, who makes accusations against delinquents or against those who are beyond the pale of the law. Therefore in no court of Porto Rico is there a Porto Rican Prosecuting Attorney having the audacity to open an office as a lawyer. Here are in force the laws of Porto Rico, and all persons obey and respect those laws. But in the Federal Court which the government at Washington has established in the island things are not done in the same manner. Perchance what was re-

pugnant to the Porto Rican legislators was not noticed by the legislators of other communities.

In the Federal Court, it is said the Prosecuting Attorney may practice, and without doubt that right conceded to said official has neither exceptions nor limitations, because the Prosecuting Attorney of the Federal Court of Porto Rico has practiced his profession as a lawyer in all classes of business.

59 The law says that the People of Porto Rico shall pay a salary of Four Thousand Dollars to the Prosecuting Attorney of that court, who is today the well known lawyer Mr. Pettingill. And the People of Porto Rico faithfully pays his salary to Mr. Pettingill. The enemies of the People of Porto Rico, those who are pursuing it, those who are litigating against it, those who have suits against it, invite the lawyer Pettingill to associate himself with their hostility and to lead them in a controversy, more or less unjust, against Porto Rico. And Mr. Pettingill gladly agrees and brings suit against the People of Porto Rico for the collection of money or the establishment of some right. Shortly after the complaint is formulated, a voucher is filed away in the Department of the Auditor, and in that it appears that the People of Porto Rico has paid the very salary which it is obliged to pay to the same man who, leagued with others, threatens it, opposes it, and forces it into a suit, before taking part in which his salary ought to be returned.

It appears to us that that is not American. We know of no law in the United States which authorizes an inconsistency so irritating, calculated to stir up hatred more than a whip laid upon the back of a people. The Constitution of the United States establishes inconsistencies as outside of reason and of law. To force money from a man and then to aim at him the blow of inciting discord is an action not in accordance with American law, nor with Pan-American law, nor with any law in the world. It might be in accordance with immoralities consented to by those who consider that an abuse finally becomes law, if there are those who consent to it. But the Porto Ricans are not willing to consent any longer to that immoral audacity.

60 It is necessary that Congress inform itself as to what class of men and what class of officials are here, speaking in the name of the United States, and what class of machines are running in the Federal centers which that same government has established in the island, without doubt intending the welfare of the Porto Ricans, and without doubt intending that the public and private rights of the Porto Ricans should be respected. The public opinion of the United States cannot, and ought not to, be deceived by causing the belief that puritanic scrupulosity prevails among us and that upright men dispense justice for us, while there exists in Porto Rico a Federal Court in which an official performs his duties, who is called a Prosecuting Attorney, who prosecutes before the court and brings suits against the People; and while the obligation rests upon the People of Porto Rico to pay that monster of immorality and that abuse of the Peoples' patience.

That Prosecuting Attorney ought to resign his position or that

awyer ought to close his office. Neither another's advice nor the
rder of the government ought to be the stimulus to bring him to
his decision; his personal conception of justice ought to be sufficient
or that. Neither the People of Porto Rico nor the officials of Porto
Rico, whose duty it is to defend the interests of the island, one of
vhich is called Public Morals, ought to consent that this machine
hould continue to run.

Certified correct.

F. FANO,
Court Interpreter.

51 Exhibit "B" for plaintiff was handed to witness for identification.

"This is the second article that was brought to my attention a short time after they were published, because at time of their publication I was in the United States."

The document was placed in evidence, marked Exhibit "B" for plaintiff and read to the jury by counsel, as follows:

52 EXHIBIT B FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," April 28, 1906.

An Outrage.

A law prohibiting the Prosecuting Attorney of the Supreme Court, the Prosecuting Attorneys of the District Courts and Judges of the Municipal Courts from practicing law is worded as follows:

"SECTION 1. That the prosecuting attorney of the Supreme Court, the prosecuting attorneys of the District Court and Municipal Judges are hereby prohibited from engaging in the practice of law; but this law shall not prevent the prosecuting attorney of the Supreme Court nor the prosecuting attorneys of the District Courts from appearing as counsel in representation of the People of Porto Rico or of any public functionary, as may be authorized by the laws now in force."

It is evident that the Legislature of Porto Rico considers it immoral that the Prosecuting Attorney of a court should exercise his profession as a lawyer before the same court of which he is a functionary. And it is also evident that the legislative power of the island is illegally opposed by the lawyer Mr. Pettingill who, claiming rights of which this country is ignorant, if indeed they exist, is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that court.

We do not see that there could be any difference between
53 the venerable President of the Supreme Court of Porto Rico and an American lawyer who at an unexpected moment presented himself to us with powers to us unknown for contesting

the will of the People of Porto Rico, litigating in suits against that government and discussing legal principles with its representatives, while the Treasury of the Island pays him his salary.

The Legislature of the Island went still further. Articles 25 and 26 of the Code of Civil Procedure read as follows:

"ARTICLE 25. A judge of the Supreme Court or of a District Court cannot practice as a lawyer or counsel in any court, except in an action or proceeding to which he is a party on the record.

ARTICLE 26. No judge, or other judicial officer, shall have a partner acting as attorney or counsel in any court of this island."

And as if it were not sufficient to close the doors to immorality with respect to the prosecuting attorneys of the municipal courts, to the Judge of the Supreme Court and to the judges of the District Courts, in still another law fixing salaries for the Registrars of Property the Legislature said:

"SECTION 9. The position of registrar of property shall be incompatible with all other positions or offices, whether such positions be elective by popular vote or not, and whether they be compensated or not; nor shall a registrar be allowed to practice his profession as lawyer."

Porto Rican ethics, diluted in the Porto Rican laws, thus state. When lawyer Pettingill is permitted to be Prosecuting Attorney of a court and a lawyer before the same and partner of a firm of lawyers and a lawyer in suits against the People of Porto Rico, against which he is constantly working, it is without doubt because the ethics of Porto Rico are a kind of ethics solely understood in the West Indian archipelago. As we hold lawyer Pettingill in very high consideration as a man of lofty ideals because of his morality,
64 intellingence and ability, we conclude that the island of Porto Rico does not understand ethics, true ethics, as the Prosecuting Attorney of the Federal Court understands them. It is possible to be prosecuting attorney of a court in Porto Rico and to be an assaulter of the People of Porto Rico, injuring it by his allegations.

The Executive Council, according to the existing laws, forms a part of the legislative power of the island. Whatever may be the present condition of the laws in force in Porto Rico the Executive Council, as respects its origin, represents the President and the people of the United States and, as respects its legislative functions, represents the People of Porto Rico and the Executive of the island. Such representative functions and such ornaments of law have no signification whatever when the lawyer Mr. Pettingill, prosecuting attorney of the federal Court, needs to defend in a suit a client of his, overlooking the respect which is due the representatives of our people. Insults, reproaches and libels were made use of in the persecution of honest editors who utter the truth, cost what it may, and expose to the light things as they are.

Hereby hangs a tale. A wild cascade leaps over the Falls of Comerio eliciting artistic admiration from some and interest from men of business. All the world knows the elaborate process through which the celebrated concession of Comerio Falls has passed. Re-

ntly a firm called "The Porto Rico Power & Light Co." obtained
Mr. Arpin, who claims certain rights against that concession,
ks lawyer Pettingill to begin a suit in defence of what he con-
lers his rights and against said firm. The Prosecuting Attorney of
the Federal Court agrees. That suit is proceeding and the
Executive Council has been a mark for the attacks of the com-
plainant. Although the Council is not the defendant, it was
e grantor of the concession, and hence is brought into the suit,
cupying the front of the stage.

Now let us see the delicate pearls which the Prosecuting Attorney the Federal Court of the island flings at the Council:

"Your orator represents that said advertisement, to which refer-
ce has been made, contains a further provision to the effect that
id Executive Council not only reserved the right to reject any
d all bids but also the right after opening the bids to treat and
rgain with any bidder so as to secure a more desirable arrange-
ent—which latter provision your orator alleges is not only un-
asonable and unprecedented in any advertisement intended to
vite fair and open public competition, but renders the invitation
ntained in such advertisement, and the proceedings carried on
ereunder, farcical and useless, the favored bidder having full
lvantage of the bids of all others in the treating and bargaining
hich is to follow.

Your orator avers that the course of action of said Executive
ouncil, and the circumstances surrounding the same, and result-
g therefrom, plainly show that the said provision was inserted in
id advertisement in bad faith and for the specific purpose of allow-
g said Council to remain free from the obligation of accepting the
west bid, if they accepted any, and free to ignore all other bids
an that made by defendant Company, so that, whatever might be
e other bids submitted, the bid of defendant might be preferred,
d afterwards, under the system of treating and bargaining pro-
ded for, the concession might be granted to defendant upon such
rms as might seem desirable.

Your orator further represents that, notwithstanding the matters
d things hereinbefore alleged, all of which your orator avers to be
ue, and of all of which the Executive Council were fully and re-
*ted*ly advised, said Executive Council received and considered the
id application or bid of said defendant Company on said 2nd day
December, 1905, against the protest of your orator as aforesaid,
ereby ignoring and acting contrary to the express provisions of
e laws and military orders governing such matters, and on the
h day of January, 1906, unlawfully, arbitrarily and fraudulently
anted the concession in question unconditionally to the defendant
mpany upon terms more favorable than said defendant had itself
fered; and that by said grant said Executive Council also attempted
confer upon said defendant the right of eminent domain. And
your orator avers that his application for said concession
could be denied and that of defendant Company admitted
and accepted, and the right of eminent domain could be

pretended to be granted to said defendant, only by said Executive Council illegally and wrongfully claiming and exercising the power as a legislative body to make laws and regulations concerning the granting of franchises and concessions wholly differing from, and inconsistent with, express provisions of existing law, which power your orator avers said Executive Council does not and has never legally possessed."

After the above and many other equally endearing allegations the *orator* prays the court that the concession of the Council be annulled. We do not know whether the Council is aware how it is being treated and has in its dignity considered what it signifies to perform acts which are arbitrary and fraudulent, and what it signifies to be accused of such acts and such evil methods. It is not known whether the Council considers itself inferior to a lawyer who insults it without proof and give forth slander in place of logic. We are ignorant whether the Council knows at this moment what is the reputation which the Prosecuting Attorney of the Federal Court gives to its legislative and executive functions, in exchange for the dollars which his client may pay him and for the voucher which the Auditor files away each month.

Of all that we are ignorant: And we are ignorant also whether the government of Porto Rico does not defend the People of Porto Rico from the abuses which are committed against it, and whether the Executive Council, the author of the law against libel, thinks that this law is made for the Porto Rican common people and not against the Americans of influence, or if that Council submits itself to the abject part to which the invective of the Prosecuting Attorney of the Federal Court wishes to assign it, extinguishing in said Council the natural impulse of dignity which in one man alone or in several united is aroused when, like a whip which stings the face, an insult is hurled against them.

67 Of the Executive Council five Porto Ricans form a part. Their acts in that Council are brought in question. That is not a dishonor, but doubts are cast upon them in that suit and they are discussed as likewise the acts of their companions, the six Americans of the Council. It is necessary that the island should know if they bow their necks in resignation before the insinuations of the first pettifogger to whom it occurs to direct at them a few insults. And it is necessary also to know whether the full Council, in obedience to just laws, complying with the duties of their office, will take the necessary measures in order that that abuse may be restrained and that machine cease to run.

If under the weight of such accusations they should submit, perchance the people might believe it true that the Council could act arbitrarily and fraudulently.

Certified correct,

F. FANO,
Court Interpreter.

68 Exhibit "C" for plaintiff was handed to witness for identification.

"This is the Correspondencia of June 7th, which contained the third article in the series, and which was before I returned from the States."

The document was placed in evidence, marked Exhibit "C" for plaintiff and read to the jury by counsel, as follows:

69 EXHIBIT C FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," June 7, 1906.

A Scandal.

"La Correspondencia," affirms categorically that there exists in the United States no law which authorizes the prosecuting attorneys of the courts to practice at the same time with their office the profession of law; and it affirms also that neither does there exist any law which prohibits such prosecuting attorneys from exercising such inconsistent functions. And "La Correspondencia" affirms in addition, in a positive and energetic manner in order that the news may be spread to the most hidden corners of the island, that, the North American judiciary being inspired by principles of rectitude, of morality, of equity, of good faith, and of self respect, there is not a single judicial official in any court of the United States who, while performing the duties of prosecuting attorney, has had the audacity to open an office as a lawyer, to become a member of a firm of lawyers, to go up and down hunting for clients, to stir up lawsuits, not only not against the People of the United States who assuredly would kick them out of their territory as traitors, but not even against the most poor and insignificant of the citizens of the United States.

For a citizen of the United States to bring suit against the People of Porto Rico reflecting upon their governmental bodies, accusing them of having acted in bad faith and fraudulently, is a
70 marvelous supposition. The constitution calls him a traitor who from a public office so far forgets himself as to sacrifice his country. If the citizen is a prosecuting attorney of a court, the case becomes one of inconceivable monstrosity. But even otherwise the prosecuting attorneys of the court of the United States would not consider it ethical or correct to exercise their profession in matters of private interest, because they know that within each prosecuting attorney exists always a man. If that man is honest, he will avoid the conflicts which may possibly arise between lawyer and prosecuting attorney who live together one within the other; but if that man is wicked or an exploiter or a robber disposed to make money by any means, in that concrete case he, the prosecuting attorney, keeps silence in order that the lawyer may freely practic.

For those and other reasons which we pass over in silence because it does not suit us to speak of everything at once, the honorable prosecuting attorneys of the American court are not found subject to the just criticism which Prosecuting Attorney Pettingill of the

Federal Court of Porto Rico has raised against himself by practicing a double profession and bringing suit against the People of Porto Rico where said Court sits. The prosecuting attorney of a court of the United States upon taking possession of his office takes an oath of fidelity to the laws and to the country, and when Prosecuting Attorney Pettingill took possession of his office in the island he ought to have taken a similar oath.

Congress has created here a "patria politica" which is inhabited by a people called The People of Porto Rico, and to it belong all who are not foreigners. Although we are convinced that Mr. Pettingill values his citizenship of Porto Rico at four hundred cart-loads of whistles, he is inevitably a citizen of Porto Rico;
71 and in such character he was and is bound by the oath of fidelity to the island of Porto Rico. As it would be very odd that either the lawyer or the prosecuting attorney Pettingill should deny this irresistable conclusion, we maintain that if said citizen contrives, defends, co-operates in, stirs up or aids in preparing suits against the People of Porto Rico and offends and insults its representatives, such prosecuting attorney, such lawyer and such citizen will fail in his duties; because, passing over his oath, he forgets that he cannot show want of respect for, nor insult, that power to which he has sworn fidelity and before which he ought respectfully to bow his head, giving it the highest place before the income from his lucrative practice.

Mr. Pettingill, whether as Prosecuting Attorney, as lawyer, or in both capacities, would not dare to do in the United States what he is here accomplishing with impunity. But it makes no difference that he may consider himself also exempt from punishment in Porto Rico. Let him desist from his error. The Porto Ricans will not consent to the abuse of their patience. If that man, prosecuting attorney and lawyer at the same time and before the same court, does not resolve the difficulty by his own act and does not put an end to the scandal which he is producing in the country, it will be necessary that the Porto Rican protest make known in Washington this new abuse which is being committed toward us. Now, let us pass to the facts.

Certified Correct.

F. FANO,
Court Interpreter.

72 Exhibit "D" for plaintiff was handed to witness for identification.

"That is an article published on June 8th, about the time of my return. It may be well that the court and jury understand that this article is not counted on in the libel; it simply goes to the malicious intent."

The document was placed in evidence and read to the jury, as follows:

73 EXHIBIT D FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," June 8, 1906.

Facts.

A short time since there took place in Porto Rico a *Pitiful Story.* That is what it was called by the "Porto Rico Review," a weekly publication which is edited in San Juan by ex-members of the Executive Council and ex-high officials of the government of the island. This story, which is somewhat long and complicated to be related in a moment, is that which refers to the scandal which a Mr. McKenna, Judge of the Federal Court, recently caused in the island on account of a cupidity which it is not worth while this very day at least to analyze.

Quoting from the "Porto Rico Review," which was certainly well informed and entirely in accord with public opinion, although it passed over some details which are known; quoting, we say, from that periodical we will say with respect to the matter that the Judge to whom allusi-n is made

"desired to negotiate a loan through Mr. Valdés for $800. The matter had been in the mind of Judge McKenna for some time, and he had often spoken to Mr. Mott on the subject, as the attorney for Mr. Valdés and the friend of both. Mr. Mott states that he had put the matter off from time to time, offering various excuses, and that Mr. Valdés also instructed him to avoid the question, hoping that the Judge would make some other arrangement and relieve him of his embarrassment. But at the noon hour, a week ago last Monday, Judge McKenna called Mr. Mott into his chambers and told him that the loan incident must be closed.

Mott and Cornwell consulted. They could not, of course, recommend *to* loan to their client, and then continue with the case. Upon the other hand, they were afraid, for obvious reasons, to refuse it. They called upon Judge Pettingill, U. S. Attorney for advice.

* * *

74 The Judge caused a note for the amount stated to be drawn payable to the Clerk of the Court, Mr. Scoville. Mr. Scoville delivered the note to Mr. Mott and received eight one hundred dollar bills from Mr. Valdés, a check having been refused as a substitue for cash. The note was delivered to Judge Pettingill (Prosecuting Attorney)."

Afterward, the whole world knows that the Bar Association of American lawyers, of which said Prosecuting Attorney Pettingill is the President, suggested to Judge McKenna the necessity of resigning and immediately leaving the island.

But, perchance, does not this pitiful story, both for what it contains that is pitiful and also in the facts of the story, comprise something more to clear up, subjecting it to public comment; something more to draw out from the gloomy depth in order to view it in the

full light of criticism, subjecting it to the study of the impartial consciences of men of good judgment who know how to think logically? Of this pitiful story only the bark has been scratched. There is lacking that from the summary the characters may appear, not living the life of the official Gazette or of that absurd conventionality, which hides or may hide the truth, but living the inner life, the real life, which palpitates between a credible purpose and an impulse actual and unquestionable.

So is everything in life. So are all the pitiful stories. So is everything in the human farce, even to the point that the Nazarene had to enter into the temple and drive out with the lash the money-changers who invaded it.

Since the "Porto Rico Review" has not seen fit, as was its duty, to complete its work in this affair (that paper, which for a thousand reasons knows even intimately the characters) La Correspondencia will try to give it that consideration, even though it may be superficially.

Judge McKenna. The principal character. Perhaps a secondary character. A Judge with a large salary who needs to ask
75 from a litigant the sum of 800 dollars just before the time when he ought to decide a suit, or the incident in a suit, in which that litigant was interested. A man stricken in years, considered by some as too old. Evidence of the commission of acts which the law considers as crimes. Afterwards, his absence. In all probability he did not see the President who appointed him to his office. He has been immured in Pittsburg, and it is unknown whether his acts have been investigated or whether a prosecution or investigation will be ordered by reason of them.

Lawyer Mott. To him was made a dangerous proposition. The same Judge suggested to him that he should ask from Mr. Valdés, the client of Mr. Mott and of Mr. Cornwell, a certain sum of money. Mr. Mott draws back from the equivocal proposition. He is afraid there may be danger in it as regards the rigour of the law or the rights of his client. But he is urged on anew. The Judge again wheedles him and presses him. The business must be wound up by all means. Mott vacillates anew. He is stirred by conflicting influences. Mott acts uprightly, like an honest man. The strongest influences would favor his interest and he resists, does not decide, does not work bo-dly in favor of the loan. Then he consults Mr. Cornwell, the other lawyer of Mr. Valdés. And mark the dilemma! If they consent that the loan be made, the day of the judgment they would have to find themselves not only before the Judge but
debtor*
also before the suddenly-made creditor of their client.

*Although the Spanish reads "acreedor" it is undoubtedly a mistake. It should be "deudor" debtor.

They understood that men of honor must be so under all circumstances, and that if they mixed up suits before judges with money loaned to those judges they perchance were going to present
76 the appearance of deceiving their companions, the lawyers

of the opposite party, and to give rise to the impression or suspicion that they were scoundrels who, lacking the legal knowledge to gain their suits, made use of loans more or less indirect and more or less in exchange for a positive victory at each step. And Messrs. Mott and Cornwell were not disposed to have such things thought of them. But at the same time perhaps they were afraid of what might happen to their client if they abandoned him in that difficult situation. Then they sought the advice of Mr. Pettingill. * * *

With whom did they consult? With Pettingill, as a lawyer, or with Pettingill, as the Prosecuting Attorney? If the understanding was to consult with the *lawyer,* what necessity had the personal skill of Messrs. Mott and Cornwell for such advice, they likewise being lawyers? The person with whom Messrs. Mott and Cornwell agreed to consult was Mr. Pettingill as Prosecuting Attorney, because then for what purpose was the promissory note delivered to Judge (Prosecuting Attorney) Pettingill?

The consultation took place and naturally from it followed its extraordinary consequences.

Certified correct.

F. FANO,
Court Interpreter.

77 Exhibit "E" for plaintiff was handed to witness for identification.

"This is a continuation of the previous article, on the following day, and is more largely concerned with me."

The document was placed in evidence, marked Exhibit "E" for plaintiff and read to jury by counsel, as follows:

78 EXHIBIT E FOR PLAINTIFF.

Translated from "La Correspondencia de Puerto Rico," June 9, 1906.

Logic.

In the pitiful story told by "The Porto Rico Review" the personages continue marching in review. The plot needs all its varied colouring, the actors need to come forth from the ranks in order that each one may be shown in the character which animates him within the action of this most pitiful story.

Mr. Scoville. Clerk of the Court. $800 requested from a litigant are taken and owed to that litigant. But the Judge gave no writing to the litigant, but "caused a note for the amount stated to be drawn payable to the clerk of the Court." Judge McKenna knew that the creditor was Valdés Cobián; he knew that if he executed a promissory note for that sum to the Clerk of the Court he was a party to a falsehood, since he owed not a cent to him and since he was taking it in a surreptitious way so as to deceive those who might wish to know from whom he had requested the loan. Mister Clerk, perhaps engrossed in his many occupations, or per-

(officials)
haps under the pressure of suggestion as to what the authorities
of the Court were doing and were causing him to do, accepted, as it
appears, the part which was assigned to him. And he went ahead.
He gave the promissory note to Mr. Mott, proving that he knew
that, coming from Judge McKenna, the document ought to arrive
at its destination by the way of Mr. Mott. He delivered it to
the latter in exchange for 800 dollars in bills, coming from
79 Sr. Val-és Cobián. And in the custody of whom did the
promissory note remain deposited? Of the Prosecuting Attorney, of the lawyer, of the citizen of Porto Rico, Mr. Pettingill. "The note was delivered to Prosecuting Attorney Pettingill." It appears, therefore, that Mister Clerk of the Court did what he did without giving it sufficient thought. Judge McKenna persuaded him that he should be his creditor, and he acceded to that although the act were fictitious.

Sr. Valdés Cobián. The litigant. They told him that Judge McKenna needed some money. The effect Produced on Sr. Valdés by this news was unpleasant. He was expecting from Judge McKenna the decision of a suit and was awaiting a favorable one with confidence in the justice of his cause. That unexpected sabre-stroke made him suspicious. He was defending his interests but never disposed to place himself beyond the law. What did that loan signify? Was it an accident, innocent, pure, transparent, diaphanous, which had behind it no double design? Was not the occasion taken advantage of, an invitation to bribery, an insinuation half promise and half threat? Sr. Valdés in his thoughts did not meet with the solution of that grave doubt. To give 800 dollars to serve the interests of the poor old man, Judge McKenna, was not a difficult thing. But, to give them without ulterior motive. On the other hand, to give money in order to be laughed at by everybody and to buy judgments,* committing the crime of bribery which the Code punishes whoever may commit it, that, never.

Sr. Valdés was not disposed to violate the laws. But on the
80 following day what luck would befall him in the matter in
which a judgment ought to be rendered? Then his lawyers returned. They had conferred with the Prosecuting Attorney Pettingill. The latter had agreed that "the situation was unbearable and unpardonable." Everything appeared feasible and correct. Forward, then, Sr. Valdés Cobián, shielded by the opinions of the Prosecuting Attorney and his lawyers sent the money to Judge McKenna. It should be inferred that in respect to Sr. Valdés Cobián the circumstances overwhelmed him and that he acted in the matter correctly and in self defence.

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*(Note of translator.) The Spanish reads "y comprar 'gallos' y cambiar de dinero." As this phrase has absolutely no sense it is obvious that this is an error of print, it must undoubtedly mean "fallos" (judgment) and not "gallos" (roosters).

F. FANO,
Court Interpreter.

Mr. Pettingill. Prosecuting Attorney of the Federal Court of the United States in Porto Rico. Lawyer with an open office. Partner in firms of lawyers in active practice. President of the Bar Association of American Lawyers in Porto Rico. This gentleman appears also in the pitiful story taking part in the proceedings. In the account of "The Porto Rico Review" he is presented at first as an advocate "who will make known the truth in Washington,"—doubtless the truth of the events which have occurred in the Court.

Afterwards Prosecuting Attorney Pettingill disappears completely from the little story. He is not to be found, try as one may, neither as prosecuting attorney, nor as lawyer, nor as citizen of Porto Rico, nor as President of the Bar of American Lawyers. These gentlemen, the lawyers, were acting their parts alone, indignant, and resolved not by any means to consent that the good name of the toga should remain injured by the equivocal conduct of the Judge. Prosecuting Attorney Pettingill only comes in again to receive from the hands of Judge McKenna the resignation of his office and to finish a consultation and give some advice which the lawyers of Sr. Valdés Cobián sought from him.

81 But was Prosecuting Attorney Pettingill so ignorant of the matter as not to believe it a part of his duty to do and say things of greater weight? Was it the duty of the prosecuting attorney of the Federal Court in Porto Rico to relate what was occurring in Washington? Was it the sole duty of the aforesaid prosecuting attorney to receive from the hands of Judge McKenna his resignation? Did the giving of advice to lawyers and litigants under such difficult circumstances constitute the only mission of a prosecuting attorney who represents in an American court the judicial department of the United States in Porto Rico?

But what is a prosecuting attorney? What must a prosecuting attorney do? What are the duties of a prosecuting attorney? For what does that which is called a prosecuting attorney hold his position? If the prosecuting attorney of a court commits a crime, who judges him? And if the judge of another court fails in his duty, who makes complaint against him? Are the courts in the United States made so that those who are on the inside protect one another, covering up their delinquencies, if they should have committed any, and trying to obscure the path of logic so that the community may not know the truth?

Judge McKenna, forgetful of his obligations, desired to request and did request from the litigant, Valdés Cobián, the sum of $800 exactly at the moment when the former ought to have decided a suit, or a point in a suit, in which Valdés was interested. Prosecuting Attorney Pettingill knew that that was under consideration because, among other reasons, the operation was not carried out until Prosecuting Attorney Pettingill was consulted and his advice sought. The act committed by Judge McKenna constituted, until the latter should prove the contrary, the crime of supposed collusion

82 and bribery. Why, tell us, why did not Prosecuting Attorney Pettingill make complaint against Judge McKenna before the Grand Jury, still in session? Why did he not go before

that Grand Jury and say to it: "that man is attempting to commit collusion and bribery, and I denounce him in order that you, Grand Jury, may comply with your duty"?

But, no. It appears that lawyer Pettingill did not permit Prosecuting Attorney Pettingill to fulfil his duty. All that heap of instances of want of respect for the law and for the People of Porto Rico must continue and it did continue. The lawyers of Sr. Valdés Cobián ask advice of Mr. Pettingill. Is the operation to be put through or not to be? And then why did not Prosecuting Attorney Pettingill advise them that they should in turn advise their client that in no way ought he to lend himself to the persuasions of Judge McKenna who, he knew, was attempting to commit a crime or to appear as an offender? Prosecuting Attorney Pettingill did with the lawyers of Valdés Cobián what he did with the Grand Jury: neither acted nor spoke. He simply advises them in a way which the lawyers of Sr. Valdés Cobián undoubtedly considered in favor of the projected loan.

Prosecuting Attorney Pettingill knows that the operation was put through. He could have avoided it, and he did not do it. It was a crime and he passed it over. He knew also that Judge McKenna, receiving the money from Valdés Cobián, was executing, chargeable to the security for that money, a promissory note in favor of the Clerk of the Court, said Clerk being a subordinate of the Judge and a subordinate of the same Mr. Pettingill. That transaction was false. The Judge did not owe for the 800 dollars which he had just received a single cent to the Clerk of the Court. This was the first falsehood. The Clerk of the Court knew that that document was being executed for a transaction entirely unconnected with his commercial responsibility. He affixes his signature and says I owe and will pay. And he did not owe and will not pay anything connected with those 800 dollars, because justly he owes nothing. Here is the second falsehood. It is now known whether that document was endorsed or not and, if it was, it is not known by whom. What is known with certainty is that Mr. Pettingill kept the document in his pocket in order to carry it to Washington. And why did not Prosecuting Attorney Pettingill then rise in his wrath and, calling attention to the promissory note falsely executed, make complaint to the Grand Jury of another crime? Nothing; he did nothing. Of what Mr. Prosecuting Attorney did in Washington we will speak at the proper time.

83

In the pitiful story logic, that terrible logic whose light is as strong as the light of the sun, is saying to the whole world that the Lawyer Pettingill conquered Prosecuting Attorney Pettingill; which completely effaced him from the annals of duty done. He ought to have been a prosecutor, and he was not a prosecutor. He failed in his duty at the crucial moment when the court was in a great conflict. In the moment when the voice of a North American calling for justice ought to have made itself heard in the precincts of the court, ought to have proved that justice is honored among the people of the United States, ought to have repeated the fine example given by Judge Holt who, in the same precincts, said—the North

American to the Grand Jury of Porto Ricans—"that is the crime of smuggling! Your duty is to indict the smugglers!"

But, no. Prosecuting Attorney Pettingill did not care to
84 remove the clouds. There he stands, within the reach of the just censure of public opinion so that all the world may say that that prosecuting attorney ought not to exercise his profession as a lawyer. Prosecuting attorney, lawyer, man of society, whatever he may be, it is his duty to comply conscientiously with the obligations contracted in the social environment in which he lives.

"La Correspondencia" will give information to its readers of any new data which are connected with pitiful stories. We have faith in the future and in honest men. We believe in God who aids the weak against those who might perchance imagine themselves strong, considering our native land as an uncivilized country and the Porto Ricans as a glebe of Pariahs who know not how to defend their tribunals or their rights.

Certified Correct:

F. FANO,

Court Interpreter.

85 Exhibit "F" for plaintiff was handed to witness for identification.

"This is the next article that dealt with my duties."

The document was placed in evidence, marked Exhibit "F" for plaintiff and read to the jury, as follows:

86 EXHIBIT F FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," July 7, 1906.

The Law Must Be Obeyed.

The Executive Council, which has had the misfortune to remain outside of the curtain, when the curtain was lowered, that is, by voting in favor of the consumption by the orphans and the prisoners of food which was spoiled and determined to be destructive to health, at the moment when the American people and government were declaring that kind of food unwholesome and fit to be thrown away, the Council, we say, Executive, we say, is highly amiable. But when it makes itself amiable by forgetfulness of the laws, it will gain from the people discontent rather than applause.

The Foraker law establishes an Executive Council which is at the same time a Legislative House which works in conjunction with the House of Delegates. Is this the fact? All the laws of the Legislature of Porto Rico are laws made by both Houses, which have received the veto neither of the Governor nor of Congress. Is this the fact? Every law adopted which originated in the House is also a law of the Council, and every law of the Council is also a law of the House. Is this correct? The obligation to comply with the laws adopted by the Porto Rican Legislature is unavoidable on the part

of the Executive Council. Is this also true? And now, a steamshi
company, wanting in respect to the regulations of the Commissione
of Interior and desiring apparently to monopolize the water
87 of Porto Rico, threatens we know not what wrathful lawsuit
which would have to fall upon the sufficiently long-sufferin
body of Porto Rico.

And these indications of important suits are the occasion fo
a lawyer, or a representative, or a defender, or we know not what
of said Company to hold conferences with the Council, for the latte
to listen to him and recognize in him a personality within the law
sufficient for him to address himself to it with an officiousness which
we consider entirely out of the law. Very well; that lawyer i
lawyer Pettingill, a North American gentleman who is the prose
cuting attorney of a North American Court who thinks he can exer
cise the duties of prosecuting attorney, collect a large salary from the
Treasurer of Porto Rico, and bring suits against the People of Port
Rico, offending, slandering and despising its governmental repre
sentatives.

The Legislature of Porto Rico adopted a law prohibiting the
prosecuting attorneys of the Courts from practicing their profession
as lawyers. That law is the law of the Council because it is a law
of the legislature. The Council is obliged to comply with it and
if it does not, the Council will be the first to violate the laws which
itself enacts. Nowhere have we seen an indication that Congress would
ever have thought the government of Porto Rico might be a govern-
ment facing one way when an American was involved and the other
way when a Porto Rican was involved. We know not that there
exists any Proclamation of the President notifying the government
of the Island that the Prosecuting Attorneys of the Courts which
the Government at Washington establishes in Porto Rico have a right
to practice their profession; and to bring suits against the People of
Porto Rico, which is the one which pays him, and which he
88 ought faithfully to serve, without ever insulting its govern-
mental authority. Neither do we know in what law the
Executive Council finds authority for violating the Porto Rican
laws, and whether it is that the Council is thinking it is sufficient
that Juan or Pedro may say that in the United States the prosecuting
attorneys of the courts practice as lawyers and take business against
the People of the United States.

If Mr. Pettingill, who is a man as much bound as any other, or
more than any other, to a compliance with the laws, should wish
to overleap those of Porto Rico, which is paying him a lavish salary,
not on that account ought the Executive Council to forget
its duties, nor ought it to vacillate in complying with its obli-
gation, nor ought it to do with Mr. Pettingill what it certainly would
not do with a Porto Rican under like circumstances. The Council
ought not to comply or comply with the law because the person
whom it should affect may be a native or a North American.

Let the Council say: If a prosecuting attorney of a court of the
island should present himself representing private interests and,
putting one side his public functions, should begin suit against the

People of Porto Rico which the Council should represent, should ask for hearings and conferences and whispered interviews, in order to settle such and such questions which, if they should not be settled, would give rise to lawsuits which would cost the island sums of money; if the Council should see a prosecuting attorney of a court of the island mixing in such matters, what would the Council do? The audacity of such a prosecuting attorney to whom a salary is paid from the public treasury, would be punished at once at least by rejecting his pretensions because of want of capacity so to act. And how, then, does the Council not do the same with all the
89 world, whatever may be the country in which the prosecuting attorney may have been born?

The Porto Rican prosecutor might claim that the Council, ignoring the law, should recognize him as a practitioner, and he would be refused; but the other prosecutor, who claims also that the Council should ignore the law, its law, without there being any American law in conflict with the Porto Rican law relative to the exercise of their profession by prosecuting attorneys; the other prosecutor, we say, appears to have a free field. Do two similar acts induce in the Council two distinct criteria? It cannot be. Honesty rejects even the possibility of those acts.

If the law in Porto Rico says that the prosecuting attorneys of the courts must not exercise the profession of lawyer, the Executive Council cannot take into consideration any business, or proposition, or petition, or presentation of lawsuits, or intervention of any kind, which issues from, or in which intervenes, or in which represents any interested party, any man whatever who, being a prosecuting attorney of a court, claims against the laws of Porto Rico to exercise his profession as a lawyer against the People of Porto Rico.

Unless the Executive Council acts with justice, repelling every person who under such conditions should attempt to establish understandings with it, it will be the first to violate a law of the Legislature of the island which prohibits prosecuting attorneys of the courts from practicing the profession of law. The House of Delegates should then know what course to pursue. In order that the Council may be satisfied with itself, in order that it may have a right to the gratitude of the community, it must take care of itself, it must give attention to what it is doing.

90 This is not a question which can be passed in silence. This is not a question suitable for some persons to protect the rest. This is a question which vigilant men ought to analyze. Whether it be because tempestuous winds threaten in the American nation immorality and vice. Or whether it be because Porto Rico in these unfortunate days is a field of observation for those who may claim to be considered as statesmen and may wish to give proofs of the sincerity of their purposes.

Certified Correct:

F, FANO,

Court Interpreter.

91 Exhibit "G" for plaintiff was handed to witness for identification.

"This was published after I had gone again to the States."

The document was placed in evidence, marked Exhibit "G" for plaintiff and read to the jury, as follows:

92 EXHIBIT G FOR PLAINTIFF.

Translation from "La Correspondencia de Puerto Rico," October 3, 1906.

Accusations Against the Executive Council. "Said Council" Subjected to Abuse. The Executive Council Accused of Being Influenced by Important Personages. That it Acts Unfairly and in Bad Faith and Makes Private Arrangements with Companies, Says Accuser Pettingill.

A suit is at present going on in the Federal Court between Mr. A. L. Arpin, plaintiff, and the "Porto Rico Power & Light Company", defendant. It involves the concession of the Falls of Comerio. Lawyer Petingill, the prosecuting attorney of the court before which the suit is being heard and a lawyer employing himself in suits against the People of Porto Rico, is the lawyer of the plaintiff.

As the question refers to a concession made by the Executive Council, whose members are appointed by the President of the United States, the acts of that Council are discussed and criticised in that suit. As to these lines it is not a question of who is right or is not right, a question which the competent tribunal ought to decide according to its justice and wisdom.

Here it is only attempted to be shown the manner in which the prosecuting attorney of the Federal Court acts as a lawyer
93 practicing his profession in a country like this in which the laws prohibit the prosecuting attorneys of the courts from practicing their profession as lawyers and the employees who receive salaries from the People of Porto Rico, to whose laws they must swear fidelity, from violating their duties by fighting against Porto Rico and insulting the Corporate Bodies created by the Congress of the United States and selected and appointed by the President.

Doubtless the Executive Council, considering its many distractions, will not have had time to recite that famous triplet of the Grand Duchess of Gerolstein:

> Behold what is said of me
> In the Gazette from the Zuyder Zee.

But even had it the skin of a pachyderm and the falsehoods and insults of which they make it the target went in at one ear and out at the other, it is necessary to admit that what it represents in Porto Rico obliges it to take care of itself and to present itself before the people of Porto Rico with the respectability with which it ought to

othe itself, even if not out of consideration for our own people, least out of respect for Congress and for the President who mod-led and designed it in order that, as a law-maker and executor of ie law, it should labor in this island.

In the bill of complaint in the suit referred to and in the eighth aragraph it says, translated, this:

"* * * the said lawyer has also always been offering to ac-pt said concession on as favorable terms to the Government and ie public as any other applicant, notwithstanding which said Exec-ive Council has on two different occasions previous to the grant defendant herein granted concessions to other parties who were ot entitled thereto under the provisions of law above referred * * *."

In the tenth paragraph it is said:

"That said Committee (that of Franchises) of the Executive ouncil announced no conclusion touching the propositions afore-said, and held the matter under advisement—at least, with-out a decision—from the date of said hearing until the 8th day of August, 1905, on which date it made report to said Executive Council recommending the rejec-on of both bids, but assigned no reason for such recommendation. ut the lawyer alleges that from subsequent developments it appears at such action was induced by the subtle influence of prominent id powerful persons interested in defendant company, which had en been recently organized; * * * that even at the time of e submission of the propositions aforesaid in February, 1905, egotiations had been begun for a merger of these competing in-rests in such manner as should attract additional capital, and fore the action of said Franchise Committee on the 8th day of ugust aforesaid such merger had been practically completed rough the instrumentality of forming the defendant corporation id agreeing to transfer to it the properties and interests of said aldés and the San Juan Light & Transit Company and interesting erein the prominent and powerful persons before referred to; that was apparent to those interested in the new defendant company at no reason or excuse could be suggested in that behalf of said anchise Committee whereby they might prefer the pending propo-ion made by said Valdés over that of your orator: hence it was nceived that if said Committee could be induced, upon some inti-ation that upon a readvertisement for bids under changed condi-ons a new and more powerful bidder would enter the field, or other ducement equally subtle and elusive, to reject the pending proposi-ons and begin anew with such changed conditions as would be prej-icial to your orator, this new combination personified by de-ndant Company might have the field virtually to itself. And such sult was accordingly brought about. * * *

But the lawyer avers that, while said advertisement ostensibly ens the door to all bidders, and wholly ignores the requirements law hereinbefore specified restricting the right to bid, the same ntains one condition giving such overwhelming advantage in bid-ng to the defendant Company as to preclude the idea of any com-

peting bids, * * * This condition was an absolute change from any previous suggestion of said Executive Council, and was presumbly made at the private instance and suggestion of those interested in the defendant company." * * * etc.

In paragraph number 12 it says:

"That such was the purpose of the condition above set forth."

In paragraph number 13 it says:

"* * * the lawyer further avers, as additional evidence of unfairness and bad faith and of a private pre-arrangement between said Executive Council and the defendant Company, that while the advertisement * * *" etc.

95 In paragraph 14 it is written:

"* * * this last provision, your orator alleges, is not only unreasonable and unprecedented in any advertise-
(avoid) ment intended to invite fair and open public competition, but makes the same useless, the favored bidder having full advantage of the bids of all others in the "treating and bargaining" which is to follow.

And the lawyer avers that the course of action of said Executive Council, and the circumstances surrounding the same, and resulting therefrom, plainly show that the said provision was inserted in said advertisement in bad faith and for the specific purpose of allowing said Council to remain free from the obligation of accepting the lowest bid, * * * so that, whatever might be the other bids submitted, the bid of defendant might be preferred and afterwards, under the system of "treating and bargaining" provided for, the concession might be granted to defendant upon such terms as might seem desirable."

In paragraph 16 it appears:

"* * * and on the 4th day of January, 1906, unlawfully, arbitrarily and fraudulently granted the concession in question unconditionally to the defendant Company upon terms more favorable than said defendant had itself offered, * * * and the lawyer avers that his petition for said concession could be denied and that of the defendant company admitted and accepted, and the right of eminent domain could be pretended to be granted to said defendant, only by said Executive Council illegally and wrongfully claiming and exercising the power as a legislative body to make laws and regulations concerning the granting of franchises and concessions wholly differing from, and inconsistent with, the express provisions of existing law, which power the lawyer avers said Executive Council has never legally possessed."

In paragraph 17 it says:

"* * * that said defendant, its officers, agents, servants and employees, may be restrained and enjoined by the temporary order and injunction of this honorable court from proceeding with the construction of their said dam and electric plant for the utilization of the water power at the Fall aforesaid, under the pretended authority of the illegal and void franchise or concession obtained from said Executive Council of Porto Rico * * *"

After all this, which deserves such extensive comment, we believe

that the People of Porto Rico have a right to know whether the Executive Council appointed by the President of the United
96 States in this island makes concessions influenced by important personages, takes part in intrigues in order to restrict the right to make bids in the granting of franchises, which are placed under the control of said Council, inserts conditions which are made at private request and at the intimation of those interested in the Companies applying for said concessions; and if it is evident that it acts unfairly and in bad faith and makes private arrangements with Companies applying for concessions—all this in such manner as is alleged by the Prosecuting Attorney of the Federal Court presenting himself as a practicing lawyer in suits directly or indirectly against the People of Porto Rico or its representatives—or if all this is a false imputation, or a series of false imputations, maintained by a North American who perchance may consider the Executive Council as something despicable, guilty of all that of which he accuses it.

It should be imperative that, if no other recourse remains to this people, we inquire of Congress and of the President who is in this case the calumniator and who the culprit.

Certified Correct:
F. FANO,
Court Interpreter.

97 Mr. SWEET, for Plaintiff: What action, if any, did the Executive Council take with reference to these articles that have just been presented, if you know of your own knowledge?

Defendant objected to the question because the same was privileged; that it was an inquiry into the motives of a legislative body and because the Court having ruled that the motives of the President in removing plaintiff from office on the complaint of the Executive Council could not be inquired into, this question was also improper.

The objection was overruled and defendant noted his exception to the ruling.

A. "I simply know by obtaining a certified copy which counsel has in his hand."

The documents in question were handed to counsel for the defendant and afterwards to the Court and offered in evidence.

Mr. Hord for defendant Zeno Gandia objected to their admission because: They are matters of Legislative action which are not proper object of inquiry herein; Second, that they are matters of privilege; Third, that it is not competent for this Court to inquire into the intentions of the Legislative members of the Executive Council; Fourth, that said resolution shows that it was the beginning of an investigation which resulted in the removal of the plaintiff by the President of the United States, which is not a matter of investigation herein.

The Court overruled the objection and counsel for the defendant Manuel Zeno Gandia noted his exception to the ruling.

98 The two documents were placed in evidence, marked Exhibit "H" for plaintiff and read to the jury, as follows:

99 EXHIBIT H FOR PLAINTIFF.

Meeting of the Executive Council.

OCTOBER 4, 1906.

At three o'clock p. m. the Council met.

Upon the calling of the roll the following members appeared and answered to their names:

Messrs. Barbosa, Crósas, del Valle, Diaz, Falkner, Sanchez, Willoughby, Post—8.

* * * * * * *

The Committee on Franchises, Privileges and Concessions, on its own behalf, and on behalf of individual members thereof, as follows—Messrs. Roland P. Falkner, W. F. Willoughby, L. H. Grahame, L. Sanchez Morales and Herminio Diaz—submitted to the Council a communication stating that in the periodical "La Correspondencia de Puerto Rico", of the date of October 3, 1906, it is stated that suit has been brought in the United States District Court by A. L. Arpin against the Porto Rico Power and Light Company, and that the attorney for Mr. Arpin, Mr. N. B. K. Pettingill, United States District Attorney for the District of Porto Rico, has filed a paper in the United States District Court in which appear a number of phrases and expressions derogatory to the dignity of the Committee on Franchises, Privileges and Concessions and of the Executive Council, charging them with bad faith in the granting of the franchise for the utilization of the water power known as the "Comerio Falls" to the Porto Rico Power & Light Company. The Committee laid the matter before the Council with the request that a Special Committee be appointed with instructions to report at an early session of the Council whether or not the statement in said

100 periodical is correct, and, if such proves to be the case, what action should be taken by the Executive Council to rebuke the accusation of bad faith made against it in a formal document duly presented to the United States District Court by the official appointed attorney thereof, acting in an unofficial capacity.

The request of the Committee was unanimously granted and the President appointed the President of the Council, Messrs. Barbosa, Crósas and Del Valle as such Special Committee, with instructions to report tomorrow afternoon at three o'clock.

OFFICE OF THE EXECUTIVE COUNCIL OF PORTO RICO,
November 14, 1908.

I hereby certify the foregoing to be a true and correct extract from the minutes of the Executive Council of October 4, 1906.

P. DE CASTRO,
Acting Chief Clerk, Executive Council.

(Here appear affixed "Excise Tax" stamps to the value of $1.60.)

101 *Meeting of the Executive Council.*

OCTOBER 5, 1906.

At three o'clock p. m. the Council met.

Upon the calling of the roll the following members appeared and answered to their names:

Messrs. Barbosa, Crosas, del Valle, Diaz, Falkner, Grahame, Sanchez, Willoughby, Post—9.

* * * * * * *

The Special Committee appointed at the request of the Committee on Franchises, Privileges and Concessions to investigate an article in the periodical "La Correspondencia de Puerto Rico", published October 3, 1906, in which article it is stated that N. B. K. Pettingill, United States District Attorney for Porto Rico, had made certain statements in a bill of equity filed in the United States District Court for Porto Rico, derogatory to the dignity of said Committee on Franchises, Privileges and Concessions and of the Executive Council, and to recommend what action should be taken by the Executive Council in the event the statements reported in said article be found correct, submitted a report stating that it had appl-ed for and received a copy of said bill in equity and that said statements do appear therein, as reported by said periodical.

The Special Committee therefore recommended that the matter be referred to the Governor of Porto Rico for submission to the authorities in Washington with the request that they cause such steps to be taken as they may deem necessary to satisfy themselves regarding the truth or falsity of the accusations made, and for such other action as they may deem best.

102 Upon the question "shall this report be adopted?" it was decided as follows:

In the affirmative were:

Messrs. Barbosa, Crósas, del Valle, Diaz, Falkner, Grahame, Sanchez, Willoughby, Post—9.

In the negative—None.

So said report was declared duly accepted.

OFFICE OF THE EXECUTIVE COUNCIL OF PORTO RICO,
November 14, 1908.

I hereby certify the foregoing to be a true and correct extract from the minutes of the Executive Council of October 5, 1908.

P. DE CASTRO,
Acting Chief Clerk, Executive Council.

(Here appear affixed "Excise Tax" stamps to the value of $1.60.)

103 Exhibit "I" for plaintiff was handed witness for identification.

"That is a copy of the Correspondencia five days later than the last action of the Council."

Counsel for defendant Zeno Gandia objected to its admission, be-

cause it is not in and of itself libelous and also because it is no shown that the defendant is connected with the Associated Press a all and the proposed exhibit is only itself an ordinary news iten published in accordance with the duties of newspaper publishers.

The objection was overruled, the Court stating:—

"It is admitted, not that it is itself libelous, but as a part of thi whole transaction for the jury to judge," to which ruling Counse noted his exception.

The document was placed in evidence, marked Exhibit "I" fo plaintiff and read to jury, as follows:

104 EXHIBIT I FOR PLAINTIFF.

"La Correspondencia," October 10, 1906.

Extensive reports with reference to the resolution passed by th Executive Council in regard to the accusations made against it b lawyer Pettingill, Prosecuting Attorney of the Federal Court, an published by the "Correspondencia" were sent yesterday to th Associated Press of the United States.

A correct translation.

F. FANO,

Court Interpreter.

105 "I was removed from office by cable received Thanksgivin Day morning, 1906. At that time, I don't think I eve knew the defendant by sight and had hardly known of his exis ence up to the coming to me of Mr. Antongiorgi. From that tim on, I did not see him to know him up to the time of the publica tion of the first of these articles, and as either Mr. Zeno or mysel was in the States nearly all the time, I think I may say that had never known him otherwise than by sight until the time o my removal—or possibly later—to know him for the first time.

Replying to your question as to whether I had been engaged i the general practice in this Island, on November 29th, 1906, eve since I left the position of Law Judge of the United States Provi ional Court, I immediately went into the general practice, with th exception of seven weeks, when I was Acting Secretary of Port Rico pending the appointment of Mr. Hunt, after which I engage in the duties, both officially as United States Attorney and unoff cially of a practicing attorney in this and other courts of the Islan

Yes, sir, I believe the cause of this libel arose from a certain actio brought by me in this court. In March, or the latter part of Fe ruary, 1906, Mr. Francisco Antongiorgi, residence Yauco, and had an interview in which he stated his cause of action, which h claimed to have against three parties, defendant in this case bein one of them, and also stated the evidence he had in support of h statement as he made it to me, on the strength of which, at his re quest, I drew a bill in equity in this Court making certain alleg tions against these three defendants in that suit and asking for

receiver of the property involved in the estate left by his mother. The bill was sworn to by him, translated to and understood by him. The first action upon that after citing the defendant was an application for a receiver and in that suit, Messrs. Horton and Cornwell, of Mayaguez, were joined with Mr. Leake and myself as counsel for the complainant. Of those four, I, being the only one whose office was in San Juan, had the active conduct of those hearings.
106 The case did not arrive at the taking of evidence. A receiver was appointed and remained in possession for some time, after which, before anything further than pleading had taken place in the case, Judge McKenna resigned and Judge Rodey took his place. Under a ruling as to the Law limiting the jurisdiction of this Court and upon the motion of or at the request of the counsel for the defendant, the cause was dismissed from this Court for lack of jurisdiction of the parties, because the necessary diverse citizenship was held not to exist between the parties. The date of the filing of that bill was some time in March. It continued pending until after Judge Rodey's arrival, (June 15th) and the dismissal was some time in the Fall.

To my knowledge, there had been no criticism on the part of defendant or through any other source prior to the articles which have been presented here relative to my professional or official conduct in Porto Rico. As to my since learning of any charge or attack upon my professional or official character, I don't recollect any. The Correspondencia is one of the leading papers in the Island here, and, so far as I know, a paper of strength and good standing. As to the circulation of these matters in the United States because of this publication, some of my friends in the States afterward inquired about it, as a number of them saw it in the Press dispatches.

Counsel for defendant Zeno Gandia objected to the part referring to the circulation in the United States, because it had not been shown that defendant was connected with the Associated Press organization which circulated these reports in the United States and because not until the morning of this trial was the complaint so amended as to show this fact and that previous to that date the circulation in the States had related only to the removal of the plaintiff, and that testimony upon that issue now comes as a matter of surprise to the defense.
107 The objection was overruled and Counsel for defendant Zeno Gandia noted his exception to the ruling.
The witness continued:

"I want to explain my answer. I don't want to be put in the attitude of mis-stating the matter. The question asked was about the matters in general. I have no knowledge and I want to state it distinctly, that these articles independently of what resulted from them were circulated in the United States. I cannot say that I have ever seen a newspaper that made a distinct reference to these articles except coupled with the result of it."

Defendant noted his exception to the admission of the above evidence.

Two documents marked Exhibit "J" for plaintiff were handed t
Counsel for the defendant.

"This is an entire copy of the Correspondencia of November 28th
1906, and the other is a clipping. I did not save the whole paper
at the time not thinking it very important; from the Correspondenc
cia of November 27th, 1906."

The two documents were placed in evidence, marked Exhibit "J
for plaintiff and read to the jury, as follows:

108 EXHIBIT J FOR PLAINTIFF.

Translation from "La Correspondencia" of November 27, 1906.

The lawyer, Mr. Pettingill, is positively retiring from the Prose
cuting Attorneyship of the Federal Court of this island.

NEW YORK, *November* 28—1.30 p. m.

Removal of an Official.

NEW YORK, *November* 28—1.30 p. m.

Lawyer Pettingill, Prosecuting Attorney of the Federal Court o
Porto Rico, has been removed from his office.

109 "As to the extent and character of humiliation to which i
was submitted because of these publications, it was the firs
time in my life that any such reflections had ever been attempte
against my character or actions, professionally, officially, or other
wise. Up to the time I came to this Island, I had never held any
office or appointment of any kind except being Referee in Bank
ruptcy in my old district in Florida for the short time I was there
after enactment of the bankruptcy law; but I had lived in three
communities; First, in Maine, where I was raised, then fourteen
years in Florida, during ten years of which I practiced law, and
then the seven or eight years up to that time that I had lived in Porto
Rico and it was humiliating in the highest degree, not only that
such charges should be made, but that such weight should appar
ently be given them by persons who did not know me very well and
who regarded the source of those charges as a disinterested and re
sponsible source. It has resulted in the loss of friendships to a cer
tain extent and to misapprehensions on the part of former acquaint
ances and possibly people who knew more of me than about me by
personal contact and believing that there must be some fire where
there was so much smoke. It has made it unpleasant and has re
sulted in my practically refusing at least feeling indisposed to go
any place where I was likely to meet people whom I had reason to
believe assigned any importance or gave any weight to these charges
thereby depriving me of the social life, formerly pleasant."

Witness Pettingill retires temporarily.

FRANCISCO P. QUIÑOES, being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination:

"My name is Francisco P. Quiñones and I have resided all my life in San Germán, my business being sugar cane planter. Have known plaintiff since the American invasion. Yes, I read some articles in the Correspondencia about plaintiff between April and Octo-
110 ber, 1906, which I thought would hurt his reputation. After reading the articles I went to Mr. F. L. Cornwell's office, where we had a talk about it. I thought that a prosecuting attorney could not do that in Porto Rico, and everybody considered that it was immoral for him to take suits against the people of Porto Rico, but Mr. Cornwell explained to me that was the custom in the United States. The facts were explained to me and the impression generally created in the community where I reside was not a good one; it put plaintiff in a bad position before the people. I couldn't tell you now whether that impression continues to remain there, but he hasn't the same reputation he used to have. It was talked about much at the time of publication of the articles."

On cross-examination:

"I have known plaintiff since the American invasion and think he was a Judge then. I am still an intimate friend of his and have not withdrawn my friendship by reason of these articles. I believe him to be as much of a gentleman as he was before in my estimation. I do not know any of his friends who do not think as much of him as they did. It seems to me that the impression created in the community was that the publications would hurt plaintiff. I went to see Mr. Cornwell, who has been my friend and counselor for many years, and is yet, and we talked the matter over, it being the topic of the day at that time. Following the custom of the Spanish Laws, it was the idea of all the people in Porto Rico that it was immoral for a district attorney to take cases against the State and it was not until I was convinced by Mr. Cornwell that it was not so that I believed it. Yes, Mr. Cornwell is an intimate friend of plaintiff's. The impression created was bad, because we never saw a prosecuting attorney do that here before."

JUAN A. MONAGAS being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

111 Direct examination:

"My name is Juan Monagas and my residence Mayaguez. My profession is pharmacist and I have a drug store; also a sugar cane plantation. Have resided in Mayaguez since I was born and am now engaged in the cane business. I have known plaintiff since he was Judge of the Provisional Court of the United States. Yes, I remember between the months of April and October and November, 1906, reading certain articles about plaintiff in the Correspondencia. At that time, as the Altagracia could not grind my canes, I intended

to bring suit against Fritze, Lundt & Co. The Altagracia was th represented as Director and Manager by Messrs. Pettingill & Co well, whom I was going to appoint as counsel for me in my troub with Fritze, Lundt & Co. When those articles were published, I quired of Mr. Cornwell if plaintiff could also act as attorney for r and he replied that it was permitted in the States to do that.

As to what effect those articles created in and around Mayagu so far as I am concerned it produced a bad effect. I don't remem whether it produced that effect as to the others. I was not interes and did not pay any attention to those details. I suppose plainti reputation must have been good previous to the publication of th articles. Yes, sir, I have heard criticism of plaintiff after th articles were published, but not before then. Just whether his acti were immoral or not; just comment around town."

On cross-examination:

"I have known Mr. Cornwell since he arrived in Mayaguez a have been his friend and client during that time. Yes, sir, I ha known plaintiff also since he was Judge of the Provisional Cou As to my being a friend of plaintiff's, it is the friendship a m might have with a lawyer when he needs his services, that is I proposed to employ plaintiff in suit which I intended to bri against Fritze, Lundt & Company, which was not instituted beca a settlement was made. In my opinion, plaintiff has always had good reputation; that was his general reputation, and is no
112 Mr. Cornwell said that plaintiff could practice law, beca in the States it was allowed for a prosecuting attorney to so, and, in the adjustment of this difference with Fritze, Lundt Company, plaintiff and Mr. Cornwell and myself as representat of Monagas & Vidal, and Mr. Hepp as representative of Frit Lundt & Company adjusted the matter."

N. B. K. PETTINGILL being recalled testified as follows:

Direct examination.

Mr. SWEET:

Q. What have you to say as to the right of a United States att ney or a prosecuting attorney to practice in the United States profession in private matters?

Defendant objected to the question, because the matter inqui about is a matter of law; and secondly, the inquiry here is as t libel in Porto Rico and not elsewhere.

The Court overruled the objections stating that plaintiff shou be allowed to prove the custom in the States and defendant except

A. "The question of his right to do so is, of course, a question law, but I have never known it to be doubted so far as any State the United States is concerned. I have had more or less knowle of the customs of United States attorneys in regard to taking a carrying on private business in at least five districts in differe States, or four and the District of Columbia, and in all of those

has been the unvarying custom, as far as my knowledge goes—at least it was the custom at the time I had the knowledge—that the United States attorneys took private practice as a matter of course; in fact, that was the only reason which attracted to that office an able class of practitioners, who would not have given up a private practice for the sake of it. I might add in explanation of that remark that this situation is practically parallel to that in the District of Columbia, where there is a United States attorney and an
113 attorney representing the District, one being appointed by the President of the United States and the other being appointed by whatever may be the proper authority in the district. And my investigations gave me knowledge of the fact that that United States attorney not only practiced privately but practiced in cases in which the interests of the District of Columbia are directly involved on the other side."

Defendant objected to the above and moved to strike it out.

The Court overruled the objection and defendant noted his exception to the ruling.

Cross-examination:

"I did not know the defendant by sight before the publication of those articles. This I am sure of. I do not know of his having, previous to that time, looked into my conduct as United States attorney of this Court, although he may have done so. Yes, the newspaper of defendant is published in Spanish exclusively.

I was not sole counsel in the Antongiorgi suit; there were four of us—Mr. Harry P. Leake, Fred L. Cornwell, Benjamin J. Horton and myself. No, I never heard of defendant, since his articles began to be published, criticising any one of those gentlemen besides myself, but he may have done so. As to criticisms in defendant's paper having only been against me as United States District Attorney and as attorney at law, which articles of criticism all took place after I filed this suit, you may regard it so; it has never appeared to me that way exactly; they have been against me. The McKenna incident is the only line, so far as I recollect, in which my official conduct has ever been criticised, even by the defendant. All his other criticisms were directed at my private practice, as I understand it, as conflicting with my duties as district attorney. His articles were plain enough, his complaint being, I think, that I must either resign my office or quit my practice; that the two were incompatible.

I can hardly recall, at the moment, a large number of
114 friends and acquaintances who have denied me their acquaintance or friendship since these articles were published; but up to the time of publication of the article of October 3rd, I had believed myself to be, not an intimate friend, but upon friendly terms with Mr. Feuille, the Attorney General. He had known for five or six years that I was practicing privately and I had never had any cause to doubt our relations up to that time. I could also say that, I presume, of two or three other members of the Council. I certainly had every reason to believe up to that period that the Department of Justice and the President of the United States had con-

fidence in me. I had never seen any indication otherwise up to th time. I had been reappointed by President Roosevelt, but I n longer regard him as looking on me with a very friendly eye. O cannot recall the names of parties, but there is an indefinite feelin or desire to avoid companionship of a man who has had action take against him by the ruling bodies in a community like this. As my feeling this estrangement as far as Mr. Feuille and other mem bers of the Executive Council at that time were concerned, it is pec liar that I did not notice it immediately after that bill was file It was filed in March and they never felt insulted, as far as I cou see, up to the publication of the articles. I have reason to belie that Mr. Feuille and every member of the Council had knowled of the contents of that bill before the publication of these article This estrangement was never noticed by me until after the Executi Council took that action on October 4th, the next day after public tion of the article in the Correspondencia, after they had taken of cial action. So far as the records go, they became officially aware it the previous day.

No, I do not know of any United States District Attorney in t States whose salary is paid by anybody except the Federal Gover ment and I don't know that mine is either. I received my mon under the authority of the Federal Government and I always ga and received instructions as an official of the Federal Gover
115 ment, never as an official of the Island of Porto Rico and never took instructions from anybody in the Island. T Marshal paid me my salary and I presume he got the money accor ing to the directions of the Foraker Bill from the Treasurer of Por Rico. Yes, I signed a pay-roll just as the Judge signed it and every other official signed it. Not, I think, as every other official the Insular Government signed it. Some of them may be paid the same way. I don't know how they are all paid. The mon which I got came out of the Treasury of Porto Rico.

I never knew of a United States attorney in the United Sta taking a case against the United States. No, and neither did I. I had, I would have been subject to the criticism made of me."

Redirect examination:

"Yes, a United States examiner from the Department of Justi at Washington came to this court and examined the accounts."

H. P. LEAKE being called as a witness in behalf of the plainti was duly sworn and testified as follows:

Direct examination:

"My name is H. P. Leake, I live in Ponce and am a lawyer. know Mr. Pettingill especially well, having been his partner f over four years, and I know Mr. Zeno by sight. I am acquaint with the articles charged as libelous in this case and was in partn ship with plaintiff at the time of their publication. Prior to pu lication of same, there was no man at this Bar who had a bet standing than plaintiff as a lawyer professionally and I don't belie

there was a man in the Island who had a better standing officially than he had as far as his character was concerned. I have known him since May, 1899. All of us here in this Island for that length of time have known him intimately or by reputation since 1899, when General Davis appointed him Law Judge of the United States Provisional Court. He was well known all over the Island. There were very few people on the Island who did not know of him even if they did not know him, personally. Yes, sir, I was stenographer of this Court for about four years before going into partner-
116 ship with plaintiff.

In regard to the effect on the public of the publication of these articles and upon plaintiff at that time, I know what that was, as, especially in the City of Ponce, on account of being plaintiff's partner, a great number of people wanted me to explain how it was that he did these things Mr. Zeno charged him with in the Correspondencia, which is extensively read there and in other towns of the Island. When these libelous articles came out regarding plaintiff, not only his friends, but his acquaintances and people who did not know him, personally, but knew of him, came to me, his partner, and insisted on knowing why he was being charged with that sort of thing and I was kept busy there for three months explaining his conduct in Ponce and vicinity. Once at the railroad station, it made such an impression on me that I have not forgotten it, there were three men talking in Spanish and I overheard them making a good many remarks about plaintiff's character, what sort of a shameless man he must be to have done these things, and they stated their ideas were induced by the articles they had read in the Correspondencia."

Exhibit "K" for plaintiff was identified by witness as a certified copy of Bill of Complaint of Antongiorgi already testified to against Manuel Zeno Gandia et al., is placed in evidence, marked Exhibit "K" for plaintiff and read to jury as follows:

117 In the District Court of the United States for Porto Rico.

FRANCISCO ANTONGIORGI FRANCESCHI
vs.
MANUEL ZENO GANDIA et al.

To the Honorable Chas. F. McKenna, Judge of the District Court of the United States for Porto Rico:

Francisco Antongiorgi Franceschi, a citizen of Porto Rico, bring this his bill of complaint against Ana Antongiorgi y Franceschi and her husband Manuel Zeno Gandia, Angela Antongiorgi y Franceschi and her husband Angel Cesari, Lorenza Antongiorgi y Franceschi and her husband Alejandre Franceschi, all being citizens of Porto Rico except the said Angela Antongiorgi y Franceschi and her husband Angel Cesari, who are citizens of the Republic of France.

And thereupon your orator complains and says:

That your orator and the defendant Ana Angela and Lorenza Antongiorgi y Franceschi are the only children of Angela Franceschi y Rodriguez, the widow of Francisco Antongiorgi; that the said Angela Franceschi y Rodriguez was possessed in the life time of a large estate of the value of approximately Three Hundred Thousand Dollars and had her residence and domicile for many years before and up to the time of her death in the City of Yauco, Porto Rico, but died in the City of San Juan, Porto Rico, about four o'clock in the morning of the 23rd day of November, 1905, without having made or executed any last will or testament, and that your orator and his three sisters aforesaid therefore inherited the estate of their said mother Angela Franceschi in equal parts.

Your orator further represents that for many years before the death of his said mother and up to the time of her said death he was and had been her agent and representative in the management of all the affairs relating to her property, the duties of which charge fully occupied his time and specially during the last year before the death of his said mother, who, during said time, was in
118 failing health and unable to give any personal attention to her business affairs; that on account of her failing health as aforesaid your orator's said mother during the month of July, 1905, and on the 26th day thereof went to the United States for the purpose of obtaining the most skillful medical treatment, and remaining there until the month of August of the same year, but notwithstanding all efforts her health continued to fail and she returned to the Island of Porto Rico with the intention of returning immediately to her said home in Yauco, but upon reaching the City of San Juan where she landed from the steamer bringing her from New York during the last days of August, 1905, her physical condition would not permit of a continuation of the journey, according to the advice of her physicians, and she therefore went to the home of her daughter, the said defendant Ana Antongiorgi y Franceschi; and that thereafter her physical condition continued growing worse, so that she was at no time able to continue her said journey to her home in Yauco, but remained under medical care at the said home of her daughter Ana until her death, which occurred on the date aforesaid.

Your orator further represents that during the said period of his mother's sickness in the City of San Juan, the management of her said estate required that he spend a large part of his time in Yauco where the bulk of her estate, both real and personal, was situated, but that he made frequent journeys from Yauco to San Juan for the purpose of being present with and aiding in the care of his mother and during all of said time this said mother demonstrated towards him the fullest confidence and warmest love and affection as she constantly had done during the preceding years; that your orator went to San Juan for a visit to his said mother on the 12th day of November, 1905, and remained there until the 18th day of said month when he was requested by her, induced thereto by the instigation and urgency of her daughter Ana, to return to Yauco for the purpose of obtaining a sum of money from the funds of her

said mother to be sent to New York for the use of a sister of
119 the defendant Manuel Zeno Gandia, the husband of said Ana; that in obedience to said request he returned to Yauco on the day aforesaid, intending to return to San Juan at the earliest possible moment, but on the 19th day of said month received a letter from his said sister Ana stating that his mother was better and urging him to remain until matters entrusted to him were fully attended to, and on the following day he received a telegram from his said sister again telling him that his mother was improving; that notwithstanding these advices he started on his way back to San Juan in the afternoon of the 21st of said November and arrived there at the house of his said sister about two or three o'clock P. M. on the following day; that upon his arrival he found his mother unable to speak and not fully conscious, and she never regained full consciousness until her death at four o'clock the next morning.

Your orator further alleges that his said mother had never made or attempted to make any last will or testament and that no time during her said sickness while she was in the City of San Juan did she indicate to your orator any intention of so doing, or make inquiries of him touching the condition of her property in preparation of such an act; and that at no time during the last four weeks of her life was she mentally capacitated for the making of any such testamentary disposition; that after the death of his said mother due preparations were made with the consent of all the defendants for the conveyance of her remains to the family burial ground in Yauco where her remains were interred on the 24th day of November aforesaid; but at that time nothing was said, nor was any indication given that such arrangement for burial was the result of any testamentary wish on the part of the deceased, or that she had executed any last will or testament of any kind.

Your orator further represents that thereafter he remained in full charge and control of all the estate belonging to his said mother at the time of her death without any intimation from any of the defendants of the existence of any last will and testament until about the 27th day of November, 1905, on which day the defend-
120 ants Angel Cesari and Alejandro Franceschi came to your orator's house in the City of Yauco and stated to him that his mother had on the morning of the day previous to her death made and executed a last will and testament whereby she had appointed said three defendants Manuel Zeno Gandia, Angel Cesari and Alejandro Franceschi executors thereof; that said two defendants Angel Cesari and Alejandro Franceschi told your orator that notwithstanding the fact that his said mother had left a will, yet his sisters, the said defendants Ana, Angela and Lorenzo Antongiori y Franceschi had all united in agreeing that they will not make use of said will but instead would divide all the property of your orator's said mother in equal parts between themselves and your orator; that said two defendants Cesari and Franceschi then demanded of your orator the immediate possession of all and singular the property, real and personal, belonging to the estate of his said mother, which demand

your orator, induced by the offer of an equal partition as aforesaid and not then imagining that said defendants would be guilty of any false or fraudulent representation in regard thereto, complied with, and shortly thereafter turned over to said three defendants Manuel Zeno Gandia, Angel Cesari and Alejandro Franceschi all the real and personal property belonging to said estate, including Thirty Thousand Dollars or more in cash which assets should still remain intact in the custody of said three defendants.

Your orator alleges that the estate of his said deceased mother owed no debts except current accounts for the operation thereof.

Your orator further represents that by said pretended open will and testament, a copy of which, with a true translation into the English language, is hereto attached marked Exhibit "A" and prayed to be taken as a part hereof, it appears to have been executed by the testatrix Angela Franceschi y Rodriguez in the presence of Ramon Almazan, Ramon Ruiz Arnau and Bernardo Blandino, as witnesses, at nine o'clock on the morning of the 22nd day of November, 1905, before Santiago Rosendo Palmer as Notary, and that the testatrix being unable to sign same on account of the weakness of
121 her wrist, the witness Ramon Almazan signed for her at her request; and that by the terms of said last will and testament the said testatrix disinherited your orator in so far as is permitted by the laws now in force, giving in equal parts to her three daughters, defendants hereinbefore named, the third part of her said estate which was subject to her free disposition, also giving as a betterment in equal parts to her said three daughters the second one-third part of her said estate, which is all the law allows to be so disposed of, and then devising to the four children, your orator and the three defendants hereinbefore named, in equal parts the remaining one-third of said estate; and further stating therein that the reason for so preferring her said two daughters in the distribution of her said estate was because of certain slanderous words which your orator had publicly spoken concerning her, as well as other reasons which she did not care to specify.

Your orator further represents and solemnly avers that his said mother Angela Franceschi y Rodriguez died intestate without having knowingly or voluntarily made any testamentary disposition of her estate; and that the pretended last will and testament now produced by the defendants, as hereinbefore alleged, is not the last will and testament of said Angela Franceschi y Rodriguez, but is wholly fraudulent, null and void; and that notwithstanding the existence of said fraudulent and void instrument your orator is entitled to an undivided one-fourth interest in and to all and singular the property and estate left by said decedent as one of her children and heirs at law. And your orator alleges the following as the grounds upon which he prays this Honorable Court to adjudge said pretended last will and testament to be fraudulent and void:

1.

Because on the said 22nd day of November, 1905, the same being the alleged day of execution of said pretended will, the said Angela

Franceschi y Rodriguez was mentally incapacitated to make any testamentary disposition and was not of sound and disposing mind and memory.

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2.

Because the said pretended last will and testament is not in fact the expression of the last will of said Angela Franceschi y Rodriguez, nor were its terms and provisions stated or dictated by her, but that the terms and conditions thereof were drawn up and dictated by other persons interested in said estate in opposition to the rights and interests of your orator, and that said pretended instrument was authorized to be signed in her name by the said Angela Franceschi y Rodriguez, if authorized at all, without her knowledge or comprehension of its contents or disposition.

3.

Because said pretended last will and testament was not executed and published by the alleged testatrix in the presence of the three alleged witnesses and by them signed as such witnesses in the presence of said testatrix and of each other as required by law.

4.

Because said pretended last will and testament even if executed with all the formalities required by law, was executed in consequence of duress and undue influence exercised over the testatrix in her enfeebled mental and physical condition by the said defendants Ana Antongiorgi y Franceschi and her husband, Manuel Zeno Gandia, in whose house she was then about to die and therefore the same was not her free act and deed.

Your orator avers that not only is said pretended last will and testament fraudulent and void for the reasons aforesaid, but that said pretended instrument contains internal evidences in the way of misrepresentation and false statement which proves that it is not a document which could have been drawn or authorized by the said alleged testatrix while she was in the possession of her mental faculties. And your orator specifies the following as some of such false statements:

1.

That in the third paragraph of said alleged will the statement is made that among the real estate owned by the testatrix is a half interest in the plantation San Rafael, the other half being
123 owned by the succession of Don Dario Franceschi, from whom the testatrix had it rented, and there exists within the boundaries of said plantation several parcels of land which the testatrix —; but your orator alleges that all of this statement is true and were matters known to the defendants, but that the purchase of said parcels of land within the boundaries of said estate had been made by your orator after the departure of his said mother for the United States and was unknown to her, she having been in a low state of

health, your orator had never informed her of said purchase either by mail during said absence or after she returned to Porto Rico.

2.

That in the same third paragraph of said alleged will it is stated that the testatrix had several deposits in some of European Banks, without stating the names and location of said banks and that whilst she does not remember the amount of money in her safe at Yauco she does remember that it includes the sum of Thirty-five Thousand Dollars, which was an amount at one time deposited in the commercial house of Fritze, Lundt and Company, pending the purchase of a plantation at Cabo Rojo, which purchase afterwards failed to be consummated; but your orator alleges that the fact is that said alleged testatrix kept money deposited in only two banks in Europe, in each of which she has had deposits for many years, and with the names and locations of which she was entirely familiar, but the names of said banks and the location thereof were not known to any of the defendants; and your orator alleges that the fact with reference to the money deposited in the house of Fritze, Lundt and Company is, as follows:

The amounts deposited was not Thirty-five Thousand Dollars, but was $33,000. of which only $24,000. was taken from the safe of said alleged testatrix, the balance of Nine Thousand Dollars being the balance of the account current of your orator with said house of Fritze, Lundt and Company; that thereafter said sum of $24,000. was withdrawn from said house Fritze, Lundt and Company and returned to said safe of orator's said mother from which it
124 was subsequently taken in different amounts and invested in a capital stock of the electric light company of Yauco and for other purposes, as appears from the book of account kept by your orator and now under attachment by this Honorable Court and in the possession of its Marshal, all of which investments were well known to the alleged testatrix, but were unknown to any of the defendants.

3.

That in the same third paragraph of said pretended last will it is stated that the testatrix has Four Thousand Dollars and several pieces of diamond jewelry in a small valise which she had delivered to your orator to deposit in said safe; but your orator alleges that the amount of money contained in said valise was not the sum of Four Thousand Dollars, but the sum of Four Thousand Four Hundred Dollars, a fact which the alleged testatrix well knew, as your orator, at her request, had turned over to her Five Thousand Dollars in Money when she departed for the United States, and she having spent but Five Hundred Dollars of that amount during her absence and having taken from the same an additional One Hundred Dollars after her return to San Juan, had re-delivered the said valise containing the balance of $4400. and the said jewelry to your orator, but not to deposit it in said safe, as said valise although used by said deceased for many years had never been deposited in the safe re-

ferred to for the very good reason that the safe was too small to permit of its entry which fact was well known to the said alleged testatrix, but was unknown to the defendants; and your orator alleges that the purpose of the delivery of said valise and its contents to him was that he should hold the same in his custody until it was again decided by his said mother; and your orator alleges that in the letter written to your orator by his said sister Ana on the 18th of said November, as hereinbefore alleged, it was stated that his mother desired him to bring back to San Juan with him the jewelry contained in said valise, which your orator complied with and delivered the said valise containing said jewelry to his said sister Ana, who still has possession and control thereof, to the best of your orator's knowledge.

4.

125 That in the fourth paragraph of the said pretended will, it is stated that Angel Cesari, one of the defendants, is indebted to the alleged testatrix in the amount of a mortgage which he had executed upon his plantation at Jagua Pasto in Guayanilla, the same being $16601 provi-cial money; but your orator alleges that the fact is that said alleged testatrix never did know the amount of said mortgage for the reason that your orator had never been able to obtain for her a copy of said mortgage, but that the amount thereof was well known to some of the defendants.

5.

That in the fifth paragraph of said alleged will it is stated that your orator had never presented to the alleged testatrix any accounts for her approval; while in fact such accounts your orator alleges had been rendered and settled up to the month of December, 1902, for which your orator obtained the full approval and satisfaction in writing by his said mother entered in the same book containing said accounts; and your orator alleges that in addition thereto the account of succeeding years had been submitted to said alleged testatrix and she had full knowledge of the transactions contained therein and had approved the same, although said approval had not been reduced to writing.

6.

That the said pretended will states that your orator was disinherited because of slanderous words which he had uttered against his said mother, the alleged testatrix; but your orator alleges that the fact is that the only occurrence which ever took place which could so be described occurred many years ago during the Spanish Domination and before your orator had become the manager and representative of his said mother, and the fact that she had forgiven your orator and could not have made such an occurrence a cause of disinheriting him is shown by her subsequent course of action in placing him in charge of all her business affairs and treating him during the subsequent years with every token of full confidence and loving affection.

7.

126 That in the thirteenth paragraph of said will it is stated that the alleged testatrix revokes and annuls every will or bequests previously made, desiring that the pretended will now questioned should be executed and complied with as her last will and testament; but your orator alleges that the fact is said alleged testatrix had never attempted to execute, and had never executed, or expressed any intention of executing any previous last will or testament which could be revoked or annulled by the pretended document now in question, a fact which was well known to said alleged testatrix, but which was unknown to the defendants.

8.

That in the tenth paragraph of said alleged will it is stated that the testatrix desires that the part of her estate adjudicated to your orator shall be paid in money, and specially that her one-half interest in the plantation San Rafael shall be adjudicated to her three daughters, as if it had been expressly devised to them; but your orator alleges as a fact that the said alleged testatrix as late as the 16th day of said November called your orator and his two sisters Ana and Lorenza to her bedside and expressed to them her wish that no one of her children should part with the interest in said plantation San Rafael, but should continue as joint owners of her one-half interest and as lessees of the other half interest already rented and that her said four children should continue as joint owners and lessors of said estate in harmony.

9.

That in an additional clause of said pretended will it is stated that the alleged testatrix desires to make known that she has not given her signature in blank so as to serve in the execution of any instrument. Your orator alleges that this statement was unnecessary and would not have been made by your orator's said mother, the alleged testatrix, because she well knew that she has not left any signature of any kind, but said clause was inserted at the instigation of some of the defendants, because some three or four weeks previous to
127 her death your orator's said mother had expressed a desire to sign certain drafts in blank for the purpose of delivering to your orator the money deposited in the European banks, which fact your orator had communicated to the defendants Manual Zeno Gandia and his wife Ana, but notwithstanding that your orator had on the same occasion, informed them and his said mother that he did not desire his mother to do so, said defendants were afraid that said signature had been given for that purpose, and they therefore caused the insertion of said clause in said pretended last will and testament.

Your orator further represents that the three defendants, Manuel Zeno Gandia, Angel Cesari and Alejandro Franceschi, named as executors in said pretended last will and testament, pretending to qualify as such by making oath before a Notary that they would

comply to the extent of their abilities with the obligations imposed upon them by said office of executors, filed the said alleged will in the office of the Notary, Santiago Rosendo Palmer, San Juan, where the said alleged will remained; and that basing their petition upon the terms of said alleged will and the said oaths which they had taken to qualify as executors thereof, the said three defendants last named, on the 13th day of December, 1905, presented their petition to the District Court of the District of San Juan, Porto Rico, in which they falsely and fraudulently alleged that the last place of residence of said deceased lady was the City of San Juan, Porto Rico, accompanying the same with a notarial certificate setting forth the filing of their oaths, as aforesaid, and praying that said Court should issue to them letters of administration upon the estate of Angela Franceschi Rodriguez, deceased; that said Court in an ex parte proceeding upon said petition, without citation or notice to any of the heirs, devisees or other parties interested in said estate, made an order on the 6th day of January, 1906, granting to said petitioners the letters of administration so prayed, not requiring the giving of any bond by them or any other security for the faithful discharge of their duties; all of which will more fully appear from a certified
128 copy of said proceedings with a true translation thereof into the English language hereto attached and marked Exhibit "B," and prayed to be taken as part hereof.

But your orator avers that said exparte proceeding in said District Court of the District of San Juan, and the letters of administration granted to said defendants thereunder are wholly null and void and said defendants are now acting as such executors and administrators of said estate under the letters so granted wholly without authority of law, for the following reasons:

1.

Because the representation made to said District Court of the District of San Juan that the place of last residence of the deceased was said City of San Juan, was fraudulent and false, the fact being that the last residence of the said deceased was the City of Yauco, which is not within the judicial district of San Juan, but is within the judicial district of Ponce, within which latter named judicial district is also situated the greater part of the property left by said deceased, and therefore the said District Court of the District of San Juan was wholly without jurisdiction to entertain said petition or to grant said letters of administration.

2.

Because the petition presented to the said District Court, aforesaid, was not verified by the oath of any person, and did not set forth the names and residences of all the persons entitled to inherit in the estate of the decedent, or the amount and nature of the property left by the decedent subject to distribution, as is required by said Act of March 9th, 1905, under which said petition was alleged to have been presented; nor was the same accompanied by a certified copy of said alleged will in which said petitioners were appointed executors,

wherefore said District Court of San Juan had no jurisdiction to issue said letters of administration.

3.

Because the order of said Court directing the issuance of said letters of administration was made without the issuance of citation or notice to any of the heirs or legatees under said alleged will to appear at a hearing to be held upon said petition, but said proceedings were wholly exparte and without notice, wherefore said letters of administration so granted by said District Court are wholly null, void and of no effect.

Your orator further represents that on the 9th day of January, 1906, the defendants, Manuel Zeno Gandia, Angel Cesari and Alejandro Franceschi, claiming to be authorized thereunto by the terms of said pretended will and said void letters of administration issued thereunder, began on the law side of this Honorable Court a suit against your orator alleging that the said Angela Franceschi y Rodroguez was entitled at the time of her death to the possession of Eighty Thousand Dollars in money which your orator had detained from her, and praying for a judgment against your orator for said sum of money with damages and costs; that at the same time, as an incident of said suit, said plaintiffs asked for and obtained a writ of attachment under the authority of which all the property owned by your orator has been seized and is now held in the possession of the Marshal of this Court; that the bond required upon the issuance of such attachment was fixed at the sum of Ten Thousand Dollars, which the said plaintiffs deposited in cash with the Clerk of this Court.

And your orator alleges that the said Ten Thousand Dollars in cash so deposited by the plaintiffs as security for their said attachment is a part of the Thirty Thousand Dollars which your orator had theretofore delivered up to the plaintiffs as a part of the assets of said estate of Angela Franceschi y Rodriguez, as hereinbefore set forth. Your orator again solemnly avers, as he had hereinbefore stated, that he is not indebted in any amount whatever to said estate, but that even if he were, the said last named defendants have no right or authority to bring said suit in representation of said estate for the reasons hereinbefore set forth and alleged, and for the further reason that even were said pretended will not fraudulent and invalid, it is provided in the fifth paragraph thereof, that even if your orator has expended for his own use moneys belonging to the estate of his said mother, he shall be relieved from the payment of such sums, whatever they may be, and they shall not be demanded of him, provided that your orator should deport himself toward his sisters with brotherly affection, which, your orator alleges, he has always done up to the date of the violation of such a spirit on the part of the defendants by the bringing of the suit aforesaid. Your orator, therefore, avers that said suit on the law side of this Honorable Court is utterly without foundation and was not brought in good faith by the plaintiffs, but was instituted by them fraudu-

lently and maliciously with knowledge that no such indebtedness existed and as a result of a combination and conspiracy between them and the other defendants to sequestrate all the property, assets and resources of your orator, and compel him to recognize the false, fraudulent and void document in the shape of a last will and testament hereinbefore referred to, and to accept the one-twelfth part of the estate of his said mother devised to him by said fraudulent document instead of the one-fourth part thereof, to which he is entitled under the law as an heir of his said mother, the difference in value between said quarter part and said twelfth part of said estate being not less than Fifty Thousand Dollars.

Your orator further represents that the defendants aforesaid who are claiming to act as executors and administrators under said pretended last will have not only obtained possession of the said Thirty Thousand Dollars in cash which was delivered to them by your orator, but also by virtue of their possession under a similar claim of the real estate belonging to said estate they are also collecting and taking possession of the proceeds of some Three Hundred and Fifty acres of sugar cane which is now being cut on the property of said estate, and all of which will be cut and delivered and paid for within the next three months, which proceeds will amount to $75,000.00 or $80,000.00, as well as a considerable income from other sources of said estate, and your orator alleges that a large amount of the cane aforesaid is being ground by the Guanica Centrale and that the account therefor will be settled by said Centrale within a very short time. And your orator alleges that not only have said
131 defendants not be*ing* required to give bond as such executors and administrators, but that the said defendant Manuel Zeno Gandia, has no property appearing in his own right; that the defendant, Angel Cesari, although possessing a small amount of property, has debts greatly in excess of his assets, and that the defendant, Alejandro Franceschi has a capital not exceeding Ten Thousand Dollars, and that even the property which the last two named defendants possess bears incumbrances of considerable amount. Your orator is informed and believes that said defendant, Manuel Zeno Gandia, has an unsatisfied judgment entered against him on the law side of this Court.

Your orator further represents that he is informed and believes that besides the Ten Thousand Dollars deposited by said defendants with the Clerk of this Court, as aforesaid, the said defendants, claiming to be administrators, have not deposited the balance of said Thirty Thousand Dollars in any bank or depository to be used for the benefit of said estate, as in equity and good conscience they should have done and as the law requires, but that they have expended and wasted the same or the greater portion thereof in paying their individual debts and for other illegal purposes, and that they cannot now produce said sum of money or any considerable portion thereof if required so to do by the order of this Honorable Court. Your orator, therefore, avers that should said defendants be allowed to continue in the control and administration of said estate and to collect the proceeds of said crop of sugar cane, and the other income

from said estate which would come into their hands without the intervention of a Receiver of this Court to take charge of said estate and manage the same pending the determination of the rights of your orator, the assets of the said estate would be dissipated and wasted and the rights of your orator would be irreparably injured, as said defendants would be unable to respond in damages for the injuries which your orator would so suffer.

Forasmuch, therefore, as your orator is without remedy in the premises except in this Court of Equity, and to the end that the defendants may, if they can, show why your orator should not
132 have the relief hereby prayed, and may, according to the best and utmost of their remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived, he now prays the Court for a writ of subpœna to be directed to the said Manuel Zeno Gandia, Ana Antongirogi y Franceschi, Angel Cesari, Angela Antongiorgi y Franceschi, Alejandro Franceschi and Lorenza Antongiorgi y Franceschi, commanding each of them at a certain time and under a certain penalty therein to be named, personally, to appear before this Honorable Court and then and there full, true, direct and perfect answer make (but not under oath an answer under oath being waived) to all and singular the premises and to stand —, perform and abide by such order, direction and decree as may be made against them in the premises; that the said pretended last will and testament of the said Angela Franceschi y Rodriguez may be decreed to be null, void and of no effect for the reasons hereinbefore alleged; that it may be decreed that the District Court of the District of San Juan was without jurisdiction to issue said letters of administration hereinbefore described, and that the same are null and void and constitute no authority for the defendants Manuel Zeno Gandia, Angel Cesari and Alejandro Franceschi to have demanded and taken, or to continue in the possession and control of said estate or to institute the said suit against your orator on the law side of this Honorable Court; that the said defendants last named may be restrained and enjoined from further prosecuting said suit until the further order of this Court; that your orator may be decreed to be an heir at law of his said mother, Angela Franceschi y Rodriguez, and as such entitled to an undivided one-fourth part of all the estate left by her undisposed of by a valid last will and testament; that a Receiver may be appointed by and under the authority of this Honorable Court to take possession, control and management of all and singular the property, real, personal and mixed, belonging to the estate of said Angela Franceschi y Rodriguez during the pendency of this suit or until the further order of this Court; that said defendants may be required to turn over and deliver to said Receiver all and
133 singular the assets and property, of whatever nature, kind and character, whether delivered to them by your orator as hereinbefore set forth, or received by them from any other source, belonging to the estate of said Angela Franceschi y Rodriguez; that said defendants be further required to render a full, true

and particular account of all and every sum and sums of money which has or have been received by them or either of them, or any other person or persons by their or either of their order, or for their or either of their use, for and in respect of the rents and profits of the real estate belonging to the estate of the said Angela Franceschi y Rodriguez; also that said defendants may discover and set forth a full, true and particular account of all and singular the personal estate, effects, money and choses in action and other assets belonging to the estate of said Angela Franceschi y Rodriguez, and of eve y part thereof, which has been possessed by or come to the hands of said defendants, or either of them, or to the hands of any other person or persons by their, or either of their, order, or for their or either of their use, with the particular nature, qualities, quantities and true and utmost values thereof, and of every part thereof, and how the same and every part thereof has been applied and disposed of; and whether any and what part thereof now remains undisposed of and why; and whether any and what part of such personal estate remains outstanding to any and what amount, and why; that said defendants and all other persons now having or hereafter coming into possession, control or use of any assets, real or personal, of whatever kind or nature belonging to said estate may be required to turn over and deliver the same to the said Receiver of this Court; that the possession and control of said estate of said decedent by this Court through its Receiver may continue until the administration thereof is properly begun as an intestate estate in the District Court for the District of Ponce where such administration properly belongs under the laws of Porto Rico; and that your orator may have such other and further relief in the premises as equity may require and to your Honor may seem meet.

PETTINGILL & LEAK.
HORTON & CORNWELL,
Solicitors for the Complainant.

134 DISTRICT OF PORTO RICO,
City of Ponce, ss:

Personally appeared before me, the undersigned Deputy Clerk of the United States District Court for Porto Rico, Francisco Antongiorgi Franceschi, who, after having been duly sworn by me according to law, deposes and says: That he is the Complainant upon whose behalf the foregoing bill of complaint is to be filed; that he has had the same read, translated and explained to him in the Spanish language and that he is fully informed of the contents thereof; that the statements of fact therein alleged are true, and that the statements upon information and belief, this deponent believes to be true.

FCO. ANTONGIORGI.

Sworn to and subscribed before me this 23rd day of January, 1906.

A. AGUAYO, *D. C.*

135 Cross-examination:

"I am plaintiff's intimate friend, my opinion of him is good and always will be good; it was not affected by these articles, because I knew him intimately, but it would have been had I not known him well. I couldn't say as to whether my explanations were satisfactory to the people or not. The burden of their complaint was that the Correspondencia was a well-known paper and had been a reputable newspaper and that Mr. Zeno was an intelligent and respectable man. Plaintiff is a respectable and prominent man, and when the newspaper was filled with those attacks against him, the people became excited about it and thought there must be something extraordinarily wrong with plaintiff's conduct and attitude when these articles culminated in his removal. Yes, the people in Ponce thought these acts which defendant had charged plaintiff with were immoral. These people were Spaniards and Porto Ricans and at that time did not know the motive that induced defendant to publish these articles; they did not know that defendant himself had a suit in the court, which I was careful to tell them. Mr. Cornwell and Mr. Horton were associated with plaintiff and myself in that suit, as well as Pepe Tous Soto, who was the lawyer in the suit filed in the Ponce District Court. As to defendant criticising Mr. Cornwell, or Mr. Norton, or Mr. Tous Soto, or myself, he did not do it in the newspaper and I never heard of him doing it otherwise.

In regard to the three men whom I overheard talking about plaintiff, (previously mentioned.) they were at the Ponce station, but I did not know them. Yes, I have lived in Ponce quite a while, but they did not reside there; they were strangers. I have a pretty general acquaintance all over the Island, but I did not recognize these three men; they were gentlemen, but I do not know whether they were prominent citizens or not. They were much wrought up by these articles."

Redirect examination:

"Neither Mr. Horton, nor Mr. Cornwell, nor Mr. Tous Soto, nor myself, was in public office at the time I was engaged in this case.

136 Exhibit "L" for plaintiff was identified by the witness as a copy of the Bill in the case of Arpin vs. Porto Rico Power & Light Company.

"Yes, sir, this is the Arpin Bill in the case of Arpin against the Porto Rico Power & Light Company, and is signed by Pettingill & Leake, as attorneys."

Exhibit "L" was then placed in evidence, marked Exhibit "L" for plaintiff and read to jury, as follows:

137 To the Honorable Charles F. McKenna, Judge of the United States District Court for Porto Rico, in Chancery Sitting:

Arsene L. Arpin, who is a citizen of the State of Wisconsin, brings this his bill of complaint against the Porto Rico Power & Light Com-

pany, which is a corporation organized and existing under the laws of the State of Maine and doing business in Porto Rico.

And thereupon your orator, complaining, says that during the month of September, A. D. 1898, he together with certain associates, whose interests he has since wholly acquired, determined upon acquiring in accordance with the laws of Porto Rico the right to utilize the water power of certain of the streams or rivers of Porto Rico, and, among others, that of the Rio de la Plata at a place called "El Salto" or "The Fall" within the municipal jurisdiction of Comerio, at which point it is possible, according to the estimates of competent engineers, to generate from its water-power by the construction of a proper dam and plant electrical energy equivalent to some 2000 horse power.

2. That thereupon your orator and his associates secured the services of one Eduardo Gonzales y Rodriguez for ascertaining the ownership of the lands surrounding the said place called "El Salto" and for obtaining written contracts or easements from such owners, giving to him as the representative of your orator and associates authority for the construction of the necessary works upon their lands; and that the said Gonzales, on the 25th day of September, 1898, obtained written easements or licenses as aforesaid from Eduviges Nieves, Jesús María Rivera, Dionisio Morales and
138 Pedro del Valle, who were owners of different parcels of land bordering on said river Plata at or near the Fall aforesaid, which covered all lands belonging to them which it might be necessary or desirable to use for the purpose indicated—which easements were duly transferred to your orator or his associates and are now owned by your orator, and in connection with which your orator and associates afterwards obtained conveyances of titles in fee as follows:

On or about the 7th day of November, 1898, your orator and associates bought from one Hilario Torres y Rodriguez, the title then taken for convenience in the name of William D. Noble, one of said associates, a parcel of land bordering on the east side of said river Plata within said municipal jurisdiction of Comerio, which is more particularly described as follows, to wit: comprising one and one half cuerdas (approximately acres) within the barrio of Cedrito, bounded on the east and north by other lands of said Torres, on the west by said river Plata, and on the south by lands of José María Morales; which conveyance was duly recorded in the Office of the Registrar of Property at Caguas, Porto Rico, on the 16th day of November, 1898, as will more fully appear from said conveyance and its certificates of registry ready to be produced as this honorable Court may direct; and which described parcel of land has since been conveyed to, and is now owned by, your orator.

On or about the 9th day of November, 1898, your orator and associates, taking title in the same manner as aforesaid, purchased from said Pedro del Valle another tract or parcel of land situated on the east side of said river in the same barrio of Cedrito, comprising three cuerdas, bounded on the east and south by other land of Juan Dio-

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nisio Morales, and on the west by said river Plata; also an-
139 other tract in the barrio of Doña Elena within said jurisdic-
tion of Comerio on the west side of said river near the Fall aforesaid, comprising three quarters of a cuerda, bounded on the west by lands of said Pedro del Valle, on the north by lands of Eduviges Nieves, on the south by lands of Jesús Rivera, and on the east by said river; which conveyance was duly recorded in said Office of the Registrar of Property in Caguas aforesaid on the 21st day of December of the same year, as will more fully appear from said conveyance and its certificate of registry, ready to be produced as this honorable Court may direct; and which described parcels have since been conveyed to, and are now owned by your orator.

On or about the 13th day of December, 1898, your orator and associates, taking title in the same manner as aforesaid, purchased from one Celestino Perez y Rivera, as guardian for Encarnación Bermudex y Gonzalez, a minor, another parcel of land situated on the west side of said river in the same barrio of Doña Elena, containing two cuerdas, bounded on the east by said river Plata, on the north by land of Pedro del Valle, on the west by other land of said minor child, and on the south by lands of Eduviges Nieves, which conveyance was duly recorded in said office of the Registrar of Property in Caguas aforesaid on the 15th day of December of the same year, as will more fully appear from said conveyance and its certificates of registry, ready to be produced as this honorable Court may direct; and which said parcel has since been conveyed to, and is now owned by, your orator.

And for the better knowledge and clearer understanding of this honorable Court in regard to the situation of said respective parcels of land with reference to said water-fall in said river Plata at the point aforesaid, your orator files herewith a map or plan showing the same, which he alleges to be a correct representation of said Fall and its surroundings, drawn to a perfect scale, and which is
140 marked "Exhibit A" and prayed to be taken and considered as a part of this your orator's bill of complaint.

And your orator further alleges that said map contains a correct representation of the different parcels of land at or near the Fall in question owned by, or subject to an easement in favor of, your orator, as well as those parcels formerly owned or claimed by one Ramón Valdéz, who has lately, as your orator is informed and believes, transferred all his rights to the defendant in this suit, which rights and claims are the only ones acquired by said defendant up to the present time; that the tracts numbered 1, 3, 5 and 6 are those bought by your orator and associated from Torres, del Valle and Rivera as aforesaid, and the tract numbered 2 was in like manner bought about the same time from one Morales, all the land belonging to complainant being edged in yellow; that the only tracts ever owned by said Valdéz, or now owned by defendant Company are those numbered 4 and 7, the same being edged in red on said map, while in addition thereto said Valdez claimed, and said defendant Company may now claim, an easement or right of way for purposes of construction of their said plant, acquired from the original grantors of your orator,

over tracts numbered 3 and 5 but over no other tracts—which said easement or right of way is disputed and claimed to be invalid by your orator.

3. Your orator further represents that, in pursuance of the desire of himself and his then associates Noble to obtain from the then Military Government of Porto Rico, or from whatsoever authority might succeed thereto, a franchise or concession according to law for the utilization and development of the water-power aforesaid in the manufacture and distribution of electric power, the Peace Protocol between the United States and Spain having been signed on the 12th day of August, 1898, and the Army of the
141 United States having under the terms thereof occupied the jurisdiction of Comerio on the 29th day of September of the same year, they petitioned the Commander of the United States Army of Occupation as early as the 1st day of the month of October in that year for the concession desired; they subsequently entered their protest as provided by law, against a petition for the same concession made by one Ramón Valdéz who had acquired certain rights near said Fall as hereinbefore stated but had not complied with all the legal requirements; and thereafter on the 15th day of March, A. D. 1899, they filed with the proper authorities of the then Military Government of Porto Rico their amended petition, setting forth that they were the owners of the lands above described which were all that it was necessary to occupy in the building of their dam, power-house, aqueduct and all other parts of their proposed plant, according to plans and specifications for the same which were filed therewith, and requesting that they be granted a concession for such development of the water-power as prayed for and the same be declared to be a work of public utility, or that their plan for said development be made the basis as an Approved Project for the disposal of such concession as provided by law. And your orator and the said Noble at the same time filed, in addition to the plans and specifications above mentioned, a schedule of rates and charges to the public and all other documents by law required, and also deposited in the proper office the sum of five hundred and twenty pesos provincial money, the same being one per cent of the estimated cost of that part of their said project occupying the public domain, such a deposit being also required by law.

4. That another application for the utilization of a portion of said water power was made to the same Military Government by the aforesaid Ramón Valdéz who opposed the application of your orator, and various proceedings were had touching the said respective applications before the authorities of said Military Govern-
142 ment and before the War Department of the United States, but no final adjudication or award thereof was made in favor of either party up to the time when said Military Government was superseded by the Act of Congress of April 12, 1900, providing for a Civil Government for Porto Rico. But your orator alleges that the application so made by your orator and associates as afore-

said was the first and only application made for said concession by parties who had complied with every requirement of the law.

5. Your orator further represents that by a General Order No. 1, issued by the Military Governor of Porto Rico on the 18th day of October, 1898, the same being the day upon which formal possession of the territory and government of Porto Rico was transferred by Spain to the United States under the Peace Protocol aforesaid, the said Order having the force of law within said Island and being, moreover, declaratory of the recognized international law, it was provided that the provincial and municipal laws of Porto Rico should remain in force in so far as they affected the settlement of the private rights of persons and property, except as they might thereafter be modified or abrogated by military order, and that the same should be administered substantially as they were before the cession of the Island to the United States; and that on April 30th, 1900, the then Military Governor issued General Order No. 103, series of 1900, which modified the law of procedure affecting the granting of concessions such as above referred to in some material respects, but otherwise the said provincial laws remained in force as provided in said General Order No. 1, series of 1898, above referred to. But, if for any reason said above mentioned Order No. 103 did not become or remain effective, then said provincial or municipal laws governing such concessions at the date of said General Order No. 1 remained and continued in force by virtue of the provisions thereof, without modification.

143 6. Your orator further represents that, by the provisions of the Act of Congress aforesaid, approved April 12, 1900, the said Act was to go into effect on the first day of May next ensuing, and it was thereby further provided by section 8 thereof that the laws and ordinances of Porto Rico then in force should continue in full force and effect, except as altered, amended or modified by said Act, or as altered or modified by Military orders and decrees in force when said Act should take effect, so far as the same were not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable or with the provisions of said Act; by section 27 that all local legislative powers granted by the Act should be vested in a legislative assembly which should consist of two houses; the Executive Council and the House of Delegates; and by section 32 that the legislative authority therein provided should extend to all matters of a legislative character not locally inapplicable, specifying some of such powers following which it was enacted, by way of a *Proviso*, that "all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature should be made by the Executive Council, with the approval of the Governor." And your orator avers that by the last provision aforesaid the said Executive Council was not empowered to make laws or abrogate laws then existing and expressly continued in force by the other provisions of the same Act, but was only empowered to take charge and control, as an administrative body, of the proceedings preliminary to the granting of franchises, privileges and concessions in pursuance of and compliance with the laws

so continued in force or which might be thereafter enacted by the Legislative Assembly.

7. Your orator further represents that among the provincial and municipal laws of Porto Rico so continued in force by virtue of the various enactments above referred to was the "Law of Waters" one provision of which in its Article 218 was that the Governor
144 of the Province might grant authority for the establishment of mills and other industrial manufactures in buildings situated near the banks of streams, either navigable or unnavigable, to which buildings the necessary waters should be conducted by canals being afterwards returned to the streams, but that to obtain such authority it should be an indispensable requisite that the applicant should be the owner of the ground on which he purposes to construct the works or should be thereto authorized by the owner thereof; and that the continued existence and validity of this law was recognized and enforced by the Legislative Assembly of Porto Rico by amending the same in some respects during its legislative session in the year 1903, by one section of which amendment, to wit section 5, an alleged ambiguity in the law as it then existed was cleared up by enacting that the word "fabrica" (which is the word above translated *works* where used in said Article 218) should be held to include plants and works for the conversion of water-power into electricity for power, light and other purposes; and that no further amendments to or changes in said law have been made since said Act of 1903 aforesaid, and, except as above specified, the said provincial and municipal laws governing the disposition of such concessions remain in full force and effect up to the present time.

8. Your orator further represents that ever since the creation of Civil Government in Porto Rico by the Act of Congress aforesaid he, representing either himself alone or himself and his associates whose interests he has since acquired, has been a constant and repeated applicant before the said Executive Council of Porto Rico for the concession of said water-power, that he has always opposed the applications of others, claiming that he alone was entitled to receive such concession on account of being the only one who was able to comply with the requirements of said Article 218 of the Water Law, as well as always offering to accept said conces-
145 sion on as favorable terms to the Government and the public as any other applicant, notwithstanding which said Executive Council has on two different occasions previous to the grant to defendant herein granted concessions to other parties who were not entitled thereto under the provisions of law above referred to, but on each occasion such grant lapsed and became void on account of the failure of the concessionee to comply with its terms, by reason whereof, the month of February, 1905, found the Government of Porto Rico freed from any alleged obligation by virtue of previous concessions and said Executive Council once more ready to receive propositions from those desiring said concession.

9. Your orator further represents that on or about the 17th day of February, 1905, the same being the day fixed by the said Executive Council's Committee on Franchises, Privileges and Concessions

for the consideration of new propositions for a concession to develop the water-power aforesaid, your orator again submitted a proposition in writing, a true copy of which is hereto attached marked "Exhibit B" and prayed to be taken and considered as a part hereof; that notice had been given, as required by the Rules of said Committee, by the publication of the date when such applications would be received, and at said time the said Ramón Valdéz was the only other applicant; that your orator again objected to the reception of any offer from said Valdés as not being qualified under the law to bid and insisted upon his right to said concession for himself as the only qualified applicant, and moreover, the proposition so then made by your orator as shown by said "Exhibit B" was in all respects more favorable both to the Government of Porto Rico and to the interests of the public than that of said Valdés, especially in that your orator proposed a lower scale of maximum rates for ordinary consumers and a larger percentage of discount to the Insular and municipal governments, as well as a cash bonus of Two Thousand Dollars ($2000) as
146 against no cash payment whatever under the proposition of said Valdéz.

10. That said Committee of said Executive Council, upon the submission of the propositions last aforesaid, announced no conclusion touching the same and held the matter under advisement—at least, without a decision—from the date of said hearing until the 8th day of August, 1905, on which date it made a report to said Executive Council recommending the rejection of both bids or propositions then pending, but assigning no reasons for such recommendation. But your orator avers that from subsequent developments it appears that such action was induced by the subtle influence of prominent and powerful persons interested in defendant Company, which had then been recently organized; that then and theretofore said Ramón Valdés was for practical purposes the sole owner of an electric light Company which furnished electric light and power within the municipality of San Juan and of a dummy steam railway line, five miles in length, from Cataño to Bayamón, connecting with San Juan by ferry boats running across the harbor, and that a corporation called the San Juan Light & Transit Company owned the only electric trolley line in San Juan, and also furnished electric light and power in competition with the company of said Valdéz; that even at the time of the submission of the propositions aforesaid in February, 1905, negotiations had been begun for a merger of these competing interests in such manner as should attract additional capital, and before the action of said Franchise Committee on the 8th day of August aforesaid such merger had been practically completed through the instrumentality of forming the defendant corporation and agreeing to transfer to it the properties and interests of said Valdéz and the San Juan Light & Transit Co. and interesting therein the prominent and powerful persons before referred to; that it was apparent to those interested in the new defendant Company that no reason or

147 excuse could be suggested in behalf of said Franchise Committee whereby they might prefer the pending proposition made by said Valdéz over that of your orator; hence it was conceived that if said Committee could be induced, upon some intimation that upon a readvertisement for bids under changed conditions a new and more powerful bidder would enter the field, or other inducement equally subtle and illusive, to reject the pending propositions and begin anew with such changed conditions as would be prejudicial to your orator, this new combination personified by the defendant Company, might have the field virtually to itself. And such result was accordingly brought about.

11. That in the same month of August, 1905, said Executive Council, without the open presentation of any additional proposition or petition of any kind, without the source of the suggestion being entered of record, and without reciting in their resolution any advantage to be gained by the Government over previous methods of procedure, attempted to authorize and instruct the Attorney General of Porto Rico, as chairman of said Franchise Committee, to publish a notice apparently inviting all the world to compete for a concession for said water-power of said river Plata at the Fall in question, and under said authority an advertisement was, by said Attorney General, inserted in the "Engineering News", a technical periodical of Chicago, Illinois, and two or three local newspapers of Porto Rico, a true copy of which advertisement is herewith filed marked "Exhibit C" and prayed to be taken and considered as a part of this bill of complaint.

But your orator avers that, while said advertisement ostensibly opens the door to all bidders, and wholly ignores the requirements of law hereinbefore specified restricting the right to bid, the same contains one condition giving such overwhelming advantage in bidding to the defendant Company as to preclude the idea of any competing bids, to wit: the condition requiring the royalty

148 to be fixed upon an absolute cash basis, and not upon a percentage of income, as had been the case in all previous propositions; that this condition was an absolute change from any previous suggestion of said Executive Council or of any open bidder for said concession, and was presumably made at the private instance and suggestion of those interested in defendant Company because it clearly appeared that said defendant, possessing or controlling the existing market for electric power could well afford to offer a larger absolute royalty for the first years of the concession than any other applicant.

12. That such was the purpose of the condition above set forth, and that its insertion accomplished that purpose, is shown by the fact that, while the bid of defendant Company as originally made contained an offer of an absolute annual cash royalty of One Thousand Dollars ($1000.), the franchise as finally granted, after it was found that no other bidders appeared, contained no such provision; all of which will more fully appear from the bid of said defendant Company submitted by it on December 2nd, 1905, in response to the advertisement last aforesaid, and the franchise as granted to said

defendant, which was passed by the said Executive Council on the 4th day of January, 1906, and approved by the Governor of Porto Rico on the 8th of the same month, true and correct copies of which are herewith filed marked respectively "Exhibit D" and "Exhibit E" and prayed to be taken and considered as a part hereof.

13. Your orator further avers, as additional evidence of unfairness and bad faith and of a private pre-arrangement between said Executive Council and the defendant Company, that, while the advertisement aforesaid did not mention or require any limitation of the maximum rates to be charged consumers of electricity, either public or private, and while the bid submitted by defendant likewise did not mention or propose the fixing of any such maximum rate, it was considered necessary in the light of the protest presented by your orator as hereinafter alleged that some limitation upon charges to consumers should be specified in the franchise as finally granted, which was done as shown by Section 7 of said "Exhibit E". Yet your orator avers that the maximum rates so fixed by said franchise are not so low or favorable to consumers as those offered by your orator in his proposal submitted to said Executive Council in the month of February, 1905, made part hereof as Exhibit B, which proposition was still open to said Council to accept as set forth in his Protest hereinafter referred to.

14. Your orator further represents that the said advertisement, copy of which is marked "Exhibit C" as aforesaid, contained a further provision to the effect that said Executive Council not only reserved the right to reject any and all bids, but also the right after opening the bids to treat and bargain with any bidder so as to secure a more desirable arrangement—which latter provision your orator alleges is not only unreasonable and unprecedented in any advertisement intended to invite fair and open public competition, but renders the invitation contained in such advertisement, and the proceedings carried on thereunder, farcical and useless, the favored bidder having full advantage of the bids of all others in the "treating and bargaining" which is to follow.

And your orator avers that the course of action of said Executive Council and the circumstances surrounding the same and resulting therefrom, plainly show that the said provision was inserted in said advertisement in bad faith and for the specific purpose of allowing said Council to remain free from the obligation of accepting the lowest bid, if they accepted any, and free to ignore all other bids than that made by defendant Company, so that, whatever might be the other bids submitted, the bid of defendant might be preferred and afterwards, under the system of "treating and bargaining" provided for, the concession might be granted to defendant upon such terms as might seem desirable. Your orator therefore avers that he did not go through the vain form of submitting a bid under said advertisement, but at the time and place mentioned for the reception of bids presented his written protest against a procedure so unfair and so entirely inconsistent with his legal rights, a true and correct copy of which protest is herewith

filed marked "Exhibit F" and prayed to be taken and considered as a part hereof.

15. Your orator further represents that according to the plans submitted to said Executive Council by said defendant Company at the time of the submission of its said bid on December 2nd, 1905, which plans still remain unchanged, it is the purpose and intention of said defendant to build its dam for the development of the water-power aforesaid across said river Plata a short distance above said Fall referred to, so that its abutments shall be upon tracts numbered 3 and 7 according to the Plat filed as Exhibit A as aforesaid; that the acqueduct for the transmission of the water from said dam to the proposed power-house is to be built from the western end of said dam along the western side of said river throughs tracts numbered 7, 6, 5, and 4 to the power-house on said last-mentioned tract; and that the defendant Company has not now, and has at no time had any ownership of, or any valid easement or license over, the tracts of land owned by your orator and numbered 5 and 6 on said plat, nor does it even claim any such ownership, easement or license over said tract numbered 6, which has a frontage along said river of about six hundred (600) feet. And your orator further avers that, according to the plans submitted by him with his repeated applications for the concession in question, the dam is to
151 be constructed across said river between tracts numbered 3 and 6 and the acqueduct built therefrom along the eastern side of said river through tracts numbered 3, 2 and 1 to a power-house situated on said last mentioned tract, all of which tracts are, and were at the time of each of your orator's said applications or propositions for said concession, owned by your orator, or jointly with his associates hereinbefore referred to, in fee simple without restriction of any kind.

16. Your orator further represents that, notwithstanding the matters and things hereinbefore alleged, all of which your orator avers to be true, and of all of which the said Executive Council of Porto Rico were fully and repeatedly advised, said Executive Council received and considered the said application or bid of said defendant Company on said 2nd day of December, 1905, against the protest of your orator as aforesaid, thereby ignoring and acting contrary to the express provisions of the laws and military orders governing such matters, and on the 4th day of January, 1906, unlawfully, arbitrarily and fraudulently granted the concession in question unconditionally to the defendant Company upon terms more favorable than said defendant had itself offered; and that by said grant said Executive Council also attempted to confer upon said defendants the right of eminent domain.

And your orator avers that his application for said concession should be denied and that of defendant Company admitted and accepted, and the right of eminent domain could be pretended to be granted to said defendant, only by said Executive Council illegally and wrongfully claiming and exercising the power as a legislative body to make laws and regulations concerning the granting of franchises and concessions wholly differing from, and inconsistent with,

express provisions of existing law, which power your orator avers said Executive Council does not and has never legally possessed.

152 17. Your orator further alleges that, by the construction of the dam and acqueduct as proposed by the defendant as hereinbefore alleged, and by the use of the water by means of the same for the production of electrical energy, the whole of the water flowing in said river Plata above said falls during a large part of the year, and the far greater part thereof during the whole of the year, will be permanently diverted from its natural channel and pass only through the artificial acqueduct so to be built by the defendant, leaving the bed of said river along the banks of a large part of your orator's tracts numbered 1 and 3 and of the whole of those numbered 2, 5 and 6 practically dry, thereby inflicting irreparable injury upon the riparian rights of your orator in said stream and depriving him of his reasonable use of the same, contrary to law and the principles of natural justice; and that the authority so to deprive your orator of his riparian rights is attempted to be expressly given by said Executive Council in their said concession to defendant, and defendant is pretending to proceed under the authority of such alleged grant, but your orator avers that any such pretended grant is illegal, null and void.

18. Your orator further represents that said defendant is about to begin preliminary work upon its said project according to its plans aforesaid, and, as your orator is informed and believes, intends to proceed forthwith for the construction of the same, claiming the right to do so by virtue of the concession so granted by said Executive Council as aforesaid, one of the terms whereof require said defendant to begin the work of installation within ninety days after the signing of said concession by the Governor of Porto Rico; that the irreparable injury thereby threatened to the property and rights of your orator will be accomplished unless restrained and enjoined by the

153 order and injunction of this honorable court; and that the damage to your orator directly resulting therefrom, though it cannot be adequately estimated or compensated in money, will amount to far more than the sum and value of Five Thousand Dollars.

Forasmuch, therefore, as your orator is without remedy in the premises except in this court of equity, and to the end that the defendant may, if it can, show why your orator is not entitled to the relief hereby prayed and may under its corporate seal and to the best knowledge, information and belief of its proper officers full, true, direct and perfect answer make to this bill of complaint, that said defendant, its officers, agents, servants and employees, may be restrained and enjoined by the temporary order and injunction of this honorable court from proceeding with the construction of their said dam and electric plant for the utilization of the water-power at the Fall aforesaid under the pretended authority of the illegal and void franchise or concession for that object obtained from said Executive Council of Porto Rico as hereinbefore particularly set forth, from entering upon said tracts of land belonging to your orator and

numbered 5 and 6 upon the map or plan marked Exhibit A. as aforesaid for the purpose of constructing a canal or acqueduct for the passage of water thereover, and from diverting the waters of said river Plata from their natural channel so as to deprive your orator of his riparian rights in said stream as appertaining to the said tracts of land hereinbefore specified, until the further order of this court; that a final decree may be hereafter entered making the temporary order and injunction as above prayed for perpetual, and declaring null and void the said pretended franchise or concession so unlawfully and arbitrarily granted to said defendant as hereinbefore set forth, and perpetually restraining the said defendant Company, its officers, agents, servants, employees and assigns,
154 or either of them, from in any way utilizing the water-power of said river Plata at said place called "The Fall" under any grant or authority pretended to be derived from said illegal and invalid concession; and that your orator may have such other and further relief as equity may require and to your Honor may seem meet;

May it please your Honor to grant unto your orator a writ of subpœna in chancery, directed to the said defendant, The Porto Rico Power & Light Company, a corporation as aforesaid, commanding it on a day certain therein to be named and under a certain penalty therein to be expressed, to be and appear before this honorable court, and then and there full, true, direct and perfect answer make to this bill and to perform and abide by such orders and decrees as may be made by the court in the premises.

PETTINGILL & LEAKE,
Solicitors and Counsel for Complainant.

UNITED STATES OF AMERICA,
District of Porto Rico:

W. D. Noble, being first duly sworn, says that he is and has been for several years the agent of the complainant in the above suit in Porto Rico; that said complainant lives at Grand Rapids in the State of Wisconsin and is now absent from Porto Rico; that affiant is familiar with the matters and things set forth in the foregoing bill of complaint and the same are true of his own knowledge, except as to those matters and things therein alleged upon information, inference or belief and those things he believes to be true.

W. D. NOBLE.

Sworn to and subscribed before me this 28th day of March, 1906.
H. H. SCOVILLE, *Clerk.*

155 Recross-examination:

"The signature, 'Pettingill & Leake,' is in plaintiff's writing. No, sir, the defendant never criticised me in the paper or any other way that I heard of in connection with this case, possibly because I was too obscure a man. I did not occupy an official position at that time, but plaintiff did. I know the Mr. Noble who verified that

complaint and think he was then Mr. Arpin's attorney in fact in Porto Rico."

José R. F. Savage being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination.

"I am the present United States Attorney for Porto Rico. After my appointment to that office, I consulted the Attorney General of the United States about practicing in cases in which the United States is not a party and I practice in all matters wherein the Federal, Mnuicipal and Insular Governments are not involved."

Cross-examination.

"Yes, I am practicing in other cases, but take no cases against either the Insular, the Mnuicipal, or the Federal Government in Porto Rico, because I consulted with the Attorney General of the United States and received an opinion from him to the effect that he saw no objection to my practicing in any cases where the United States, the People of Porto Rico or the Municipalities were not a party. I have never found any law on the subject either way."

Whereupon plaintiff having announced that he rested his case, defendant, Mauel Zeno Gandia, appeared to testify in his own behalf, and having been duly sworn, testified as follows:

Direct examination.

"My name is Manuel Zeno Gandia, I was born in Porto Rico, and at present live in San Juan. I am a physician and surgeon; also author of some books and editor of a newspaper. As a Doctor of Medicine, I was graduated in the University of San Carlos of Madrid and remained for several years practicing in the hospitals of Paris.
156 Have practiced about twenty-three years in Porto Rico.

As to my having held any official position under the Spanish Government, Porto Rican Government or American Government, I was health officer for the Port of Ponce for nineteen years, during the Spanish Government; afterwards General Miles appointed me for the same position after the American Occupation, and since then I went as a delegate for certain Municipalities of the Island to Washington during President McKinley's time, the purpose of that commission being to ask from that Government to change the military Government and institute civil Government; afterwards, I have been twice a member of the House of Delegates.

I have been connected with La Correspondencia since between 1902 and 1903. I am not the owner of that paper, but sort of a manager, but not entirely so, or 'director' and I wrote the articles in question. Yes, sir, I heard several articles read here yesterday, but as I don't understand English those might be the articles according to the copies of the paper which are attached hereto,"

Exhibit "A" for defendant was here handed to him for identification.

"That is an opinion of Mr. Harlan, late Attorney General of the Island. Yes, sir, this paper is the Correspondencia of date May 9th, 1906."

Exhibit "A" for defendant was then offered and read in evidence as follows:

157 EXHIBIT A FOR DEFENDANT.

From La Correspondencia of May 9, 1906.

An Opinion of Mr. Harlan.

Neither can nor should the District Attorneys practice law. Should Harlan Sr. *he* asked he would be of the same opinion of Harlan Jr.

Office of the Attorney-General. December 16th, 1901. (Endorsement.) Respectfully returned to the Acting Governor.

It is clear that a fiscal may not with propriety act as a notary. The Act entitled "An Act relating to notarial practice in Porto Rico," gives the right to act as notaries only to those lawyers that are "in the exercise of their profession before the insular courts." It is to be fairly inferred from this language that the privilege is not open to fiscals. They are not exercising their profession, in the sense of that Act; but, on the contrary, are acting in an official capacity which makes the exercise by them of the profession of notary incompatible.

Moreover, in article 427 of the compilation of organic provisions relating to the administration of justice, translated by the War Department, July 18, 1899, it is expressly provided that persons appointed to offices in the department of public prosecution shall not practice law. This is an expression of public policy in relation to fiscals which, in my judgment, would necessarily exclude the fiscal from practicing as a notary.

In addition to this, I am strongly of the opinion that the government should not permit those who are enjoying good salaries to engage in practice and thus to diminish the professional rewards and opportunities of lawyers who are not in official position.

Respectfully,

JAMES H. HARLAN.

"Opinions of the Attorney General of Porto Rico." Vol. 1, pag. 91.

158 Defendant then offered in evidence a publication in the Correspondencia of October 6th, 1906, with an article which reads:

159 *The Accusations Against the Executive Council.*

Special committee to investigate the report published by the "La Correspondencia." "This is the first time, they say, that any charges have been made against the Executive Council which even indirectly infer bad faith on the part of any member or Committee of the Council." Mr. Falkner says that he trusts that the authorities in Washington will proceed in due form to clear up this matter. (Extraordinary session of yesterday.)

At five minutes past three yesterday afternoon, Messrs. Post, del Valle, Diaz Navarro, Barbosa and the Director of the Consolidate had already assembled in the meeting room of the Council.

At the desk of Dr. del Valle there were three heads very close together. Dr. Barbosa continue- the reading of a document which del Valle also did correcting some signs and constructions (as we saw afterwards when we obtained a copy), and Diaz Navarro also intervened in the work.

Shortly afterwards Sanchez Morales arrived joining the group and after seeing the document it was delivered to the Chairman Mr. Post. Afterwards Messrs. Falkner, Grahame and the Treasurer arrived. The acting attorney general Mr. Savage was seated in the public hall and afterwards appeared the District Attorney of the Supreme Court Mr. Rossy. At seven minutes past three the meeting opened. The Clerk Mr. Bennet reads the following report which is also translated into Spanish by the interpreter Mr. Iglesias, after Mr. Post states that this is the result of the meeting held
160 by the Committee this morning.

"Executive Council. Porto Rico. October 5th, 1906. The Special Committee named at the request of the Committee on Franchises, to investigate an article of the "La Correspondencia de Puerto Rico" published on October third, which alleges that N. B. K. Pettingill, the United States District Attorney for Porto Rico had made certain statements to the Disrict Court of the United States injurious to the Executive Council, and to recommend the *cause* to be taken by the Executive Council in case the said article be proved to be true, has the honor to report.

"That the Committee through the Acting Attorney General asked for and received a copy of the complaint in the case of Arsene L. Arpin against the Porto Rico Power & Light Company duly certified to be a true and exact copy by the Clerk of the District Court of the United States for Porto Rico; that in the said copy of the complaint it appears that Messrs. Pettingill and Leake are the attorneys for the plaintiff; and that in the said complaint appear the statements cited in "La Correspondencia" and which the members of the Franchise Committee object to. Should the statements have been made by any irresponsible person, the Committee would not consider it necessary to take any resolution thereon; but it believes at least that as the charges were made by a person who occupies a high position in the United States government, by virtue of the same law of Congress which created this Executive Council and by virtue of a commis-

sion of the President of the United States who also named the members of the Executive Council the affair takes on an importance reached under ordinary circumstances it would not possess.

161 The Executive Council during the seven years it has been in existence under the Civil Government of Porto Rico has been at times the object of criticism. But this is the first time in the knowled, of the Committee that any charge has been made — even indirectly infers bad faith on the part of any member or Committee of the Council, or that at least may have been indicated that the members of the Council have been moved by outside influences or improper causes: coming as they do from a person who holds the position of District Attorney of the United States, though it be not in his official capacity, the Committee believes that this charge should — be allowed to pass in silence.

The Committee therefor has the honor to recommend that the matter be referred to the Governor of Porto Rico in order that he may submit the matter to the authorities at Washington petitioning that they take such steps as they may deem proper. Respectfully submitted. J. C. Barbosa, R. del Valle, Andrés Crosas, R. H. Post."

Mr. Sanchez Morales makes a few remarks stating that he is in favor of report as read; but as he believes to understand that only a recommendation to the Government at Washington is made in it to take such measures as it may deem proper, the same should be indicated in a manner more concised and clear, that the desire of the Council is that the government at Washington make an investigation of the matter. That he hopes that the Government at Washington will treat the matter well but that as a member of the Executive Council he understands and desires that it should be well stated to the Government at Washington that the Council is disposed to and desires of a complete investigation of this matter. Mr. Post asks Mr. Sanchez if it is his opinion that this amendment

162 should be introduced in the report read or whether it is a separate motion.

The Treasurer and Mr. Sanchez mutually explained, Mr. Willoughby stating that what is desired is that Washington be asked to appoint a committee to investigate the matter and that the same be expressed clearly in the report. Mr. Willoughby makes a motion that the following be added to the end of the said report: "and that the necessary steps be taken to discover the truth or falseness of the charges made or to take such other measures which may deem convenient."

Mr. Falkners takes the floor saying that he trusts that the authorities in Washington will proceed in due form to clear up this matter. That the procedure of the Executive Council has been so clear and its actions so opened that there is not reasonable motive to believe that any investigation is necessary to confirm the actions of the Council, believing firmly that the Government at Washington would not even take any action placing under criticism the conduct of the Council.

That the Council has always proceeded according to law and the

good conscience of all *his* members and there are no motives to sustain an investigation by the authorities of the Superior Government.

Mr. Post remarks stating that in his opinion once the affair is placed before the Government for reference to the President and the Government at Washington the proper steps will be taken there.

That it has been his good fortune during the time he has been in Porto Rico to become acquainted with eighteen *met*-ers of the Council and that he had to state that he never found a corporation composed of such a force that complied with its duties more faithfully.

163 That all the r[illegible]olutions of the Executive Council have been taken with full liberty and with knowledge of every one; that all matters have been discussed before the people and the representatives of the press who have appeared at the sessions.

That the Committee fully discussed the case treated of and arrived at the conclusion that there was no matter to be investigated and that therefor- that the *e*statements made against the Council should be placed in the hands of the authorities at Washington so that they may act as they deem fit taking such measures as they may deem necessary.

The Treasurer says that he believes that the motion of Mr. Sanchez does not cover a petition for the carrying out of an investigation by the authorities at Washington but to indicate and express clearly that the Council has no objection in case that Government should deem it proper, the Council was ready to accept such an investigation.

That the authorities at Washington should have complete confidence in the members of the Council and that the charges of Mr. Pettingill are simply made by an irresponsible person who employs them as a rec-urse of an attorney defending his claim; but undoubtedly bad faith appears therein as they have no foundation nor reason at any time and less to merit an investigation by the authorities.

Sanches Morales accepts the statements made by Mr. Willoughby as he states that this form covers his desires.

That if he could see the affair from afar, outside of the position of Councilman, he would dare to state and he believes it so today, that all the country knows very well that these charges have no foundation since the credit of the Council is far above such sus-

164 spicions. That as Councilman he has to ask that everything be made so clear that there will not be the least doubt on the part of its members as to fear such action as the Government may take.

That for these reasons he was more in favor of making the situation as clear as possible as regards the acts of the Council, as in this manner it would be best for it.

Mr. Grahame makes some remarks regarding the calling of the Attorney's attention to the action of the District Attorney. (Mr. Savage smiles in confusion and Diaz Navarro calls the attention of Mr. Grahame that they are treating of the District Attorney of the Federal Court.) He shows himself to be in favor of the report and

agreeing completely with the proposition that the matter be referred to the authorities at Washington.

The report is approved unanimously together with the motion of Mr. Sanchez amending it in the manner stated by the Treasurer.

Another matter is taken up. Mr. Lions, the Superintendent of Elections arrives, and explains to Mr. Post that there has been cases in the electoral registration where precincts have had eight hundred names in one letter only. In Aguadilla letter C, has 400 and in Arecibo letter A has more than 800. He makes a large list of the different cases, citing the towns and districts and asking the approval of the report of the Supervisor dividing the letters in group- of 300.

There is a discussion between Mr. Falkner and Post regarding the said division, and afterwards the report is approved unanimously. Afterwards Mr. Lions gal-antly informs us that there are 189,000 electors registered and that there has been filed not less than 19,000 challenges of which 800 has been accepted.

165 The appointment of twenty five temporar*ily* clerks for the election office is approved.

The other Dr. has maintained silence and papers are exchanged between Mr. Herminio and him.

It is reported that tomorrow the Republican Directory leaves for Mayaguez to hold meetings. Mr. Santiago Veve visited this afternoon the acting Attorney after a long conference with Dr. Barbosa.

166 Plaintiff objected to its admission on the ground that it was a newspaper publication of the proceedings of the Executive Council and hearsay.

The objection of plaintiff was sustained by the Court and defendant noted his exception to the said ruling.

"I think the first I knew of plaintiff's existence was the day when he accused me before this Court of having forged a will. I knew that there was a prosecuting officer of this Court, but I did not know who the gentleman was. I did not know him even by sight, and I believe this is the first time I am near him. The next thing which called my attention to plaintiff, after the filing of that suit against me by plaintiff as attorney for Mr. Antongi*rogi*, was when I learned he was the prosecuting attorney of the Federal Court and I had knowledge that the laws of my country considered illegal the practice of the profession by a prosecuting attorney of a court."

Exhibit "B" for defendant was handed to the witness for identification.

"This is a paper entitled 'The Porto Rico Review,' under Mr. Sweet's (counsel for plaintiff) management. Yes, sir, I read the article called 'A Pitiable Story;' it came to my knowledge among a number of papers which were piled up on my desk the latter part of April."

Defendant then offered Exhibit "B" in evidence, to which plaintiff objected on the ground that same was irrelevant to the issues herein.

The Court overruled the objection and plaintiff noted his exception.

Exhibit "B" was then read to the jury, as follows:

167 EXHIBIT B FOR DEFENDANT.

From "The Porto Rico Review," April 28, 1906.

A Pitiful Story.

The appointment, service and resignation of Judge McKenna is indeed a pitiful story. The first mistake made in this wretched tale was when his name was suggested to the President. It is generally understood in Porto Rico that Hon. John Dalzell, of Allegheny, Pennsylvania, suggested the name of Mr. McKenna to the President for this position, and that the suggestion was made with the approval of Senator, (then Attorney-General) Knox, of Pittsburg. Mr. Dalzell has been a member of congress, as we remember, for something like twenty years, and it goes without saying that he is an able and conscientious public servant. Senator Knox is a lawyer of national reputation. If these two gentlemen had realized the importance of the appointment, and more, the character and volume of business to be transacted in the United States Court for Porto Rico, we are sure that they would not have asked the President to make the appointment.

We will not repeat the story of disappointment and disaster so deeply regretted by the litigants, the bar and the people of Porto Rico generally, covering the last two years of our judicial history. The People of Porto Rico know it, and Messrs. Pettingill, Dexter and Hord will truthfully explain it in Washington.

The People of Porto Rico are entitled to the facts concerning the final act, and briefly, we give them as they are understood by us, and, we think, justice to all requires no less, as the plain duty of the Review to its readers.

168 Last week an equity hearing of great importance to the parties interested was being heard on exceptions to the bill. Hon. Charles Hartzell represents the complainants, who, as we understand the matter, are persons formerly interested in the railroad and ferry system now owned by Mr. Valdéz. The latter is the defendant in the action, and is represented by Mr. Cornwell and Mr. Mott.

The Judge desired to negotiate a loan through Mr. Valdéz for $800. The latter had been in the mind of Judge McKenna for some time, and he had often spoken to Mr. Mott on the subject, as the Attorney for Mr. Valdéz and the friend of both. Mr. Mott states that he had put the matter off from time to time, offering various excuses, and that Mr. Valdés also instructed him to avoid the question, hoping that the Judge would make some other arrangement and relieve him of his embarrassment. But at the noon hour, a week ago last Monday, Judge McKenna called Mr. Mott into his chambers and told him that the loan incident must be closed.

Mott and Cornwell consulted. They could not, of course, recommend the loan to their client, and then continue with the case. Upon the other hand, they were afraid, for obvious reasons, to refuse

it. They called upon Judge Pettingill, U. S. Attorney, and Judge Hord, for advice. It was decided that the situation was unbearable and unpardonable.

The Judge caused a note for the amount stated to be drawn payable to the clerk of the Court, Mr. Scoville. Mr. Scoville delivered the note to Mr. Mott and received eight one hundred dollar bills from Mr. Valdéz, a check having been refused as a substitute for cash. The note was delivered to Judge Pettingill.

The American members of the bar were requested to meet on Thursday morning at the court room, and at about eleven
169 o'clock in the forenoon of that day, they assembled in the library of the Federal Court. After the facts were presented, it was decided to call upon the Judge, state the situation, and ask him to resign. This step was taken immediately, the members of the bar referred to passing directly into the Judge's chambers.

Judge McKenna stoutly denied any intention of evil, or that any motive deminated his action that could be at all inconsistent with his duties and perfect freedom of action as Judge. As Mr. Scoville had gone to lunch, a hearing of all those who had participated in the transaction was continued until 2 o'clock in the afternoon. At that hour, the Judge asked that he be permitted to consider the matter until Saturday morning at 11 o'clock. No further hearing was ever had, as at the hour stated the Judge announced that he had resigned, giving to Judge Pettingill a copy of the paper. Thus the miserable affair ended, and the Judge left for the States on last Tuesday's boat.

Such is the story, leaving out many details, but none of these details would change the fact that the Judge knew he was obtaining the loan through Mr. Valdéz. This was so manifestly improper that the Judge at once recognized the impossibility of a longer service on the bench.

As stated at the beginning, it is a pitiful story. Judge McKenna should not have been sent here. He never was equal to the great task involved, and all have suffered. Let us forget the final ending of this sad affair, and remember Judge McKenna as the courteous, kindly old gentleman that he is, and let us accept the view that he did not realize or understand the gravity of his action.

170 "I came to investigate the official conduct of plaintiff as District Attorney and as a man engaged in private practice in Porto Rico, because I was surprised to see that in conflict with the laws of my country there was a prosecuting officer who practiced his profession as a lawyer against the People of Porto Rico. I then had an opportunity to find out that the conduct of that District Attorney and of that employee was a doubtful point which deserved the analysis of public men. Public information made me learn the existence of certain lawsuits with reference to which I have not now a very clear idea, but I might give some details. One of them referred to a man named 'Ereño' on account of public works. Another was a common crime committed in the town, in which the accused was defended by the District Attorney; another one, a suit against the Treasury Department. Plaintiff's name in that

case was Mr. Ramírez, wherein they were discussing whether he should pay or not certain Custom taxes and the District Attorney alleged that the Treasurer of Porto Rico should not collect that tax. There were also other cases, all of which brought to my mind the idea that it was my duty as a newspaper man to take the matter up. Then I read the fine work of Mr. Sweet in 'The Porto Rico Review,' wherein was made public certain events or happenings, which took place in this city, wherein the position of plaintiff is laid out, and it being under that evidence, having read these articles, I felt I should follow the example of Mr. Sweet. Mr. Sweet said: 'It is my duty to tell the truth to the People of Porto Rico,' and he was telling me without being aware: 'If you are a Porto Rican, it is your duty to take up that question.' Then I wrote several articles, but never attacked the private personality of plaintiff and never did I attach any importance, nor was it a matter that interested me whether he was a good man or not. I dealt exclusively with him as a public employé and to comply with my duty as a newspaper man to offer to the critism what I considered as an immorality. The article of Judge Sweet's which I read is, I think, the one you have shown me here." (Witness examines Exhibit "B" for defendant.) "I read it in Spanish."

171 Counsel for plaintiff here admitted of record that plaintiff took civil cases against the People of Porto Rico while he was District Attorney.

"My motive having already been stated, I would like to add that my only intention was to serve public interests, the interests of my country and the Interests of the American Government.

In connection with the case of Arpin vs. Porto Rico Power & Light Company, in which plaintiff was joined by Messrs. Horton and Cornwell and Mr. Leake, I criticised very strongly the conduct of plaintiff as Prosecuting Attorney of the Court, not because he acted as attorney for a Company, but because I considered it was incompatible with his position as District Attorney; but I did not criticise any of the other lawyers who were practicing their profession. No, I have no personal feeling now against plaintiff; nor have I ever had."

Cross-examination:

"I am not aware of the fact that the Legislature of Porto Rico in 1904 gave the lawyers the right to practice, lawyers acting as fiscals, and I did not know that they practiced law here for two years. As to my claim that I made a complete investigation of this question, I was actuated by virtue of the investigation made and the result obtained.

I directed in Ponce for about fifteen days a newspaper called 'La Opinion,' but I don't remember the dates. Aside from that, I have always contributed to different papers for many years. No, sir, I was not director of a paper in Ponce in 1899-1900 and I don't remember whether any paper then existed in that city. On December 21st, 1898, I left Ponce for the States and returned in November,

1899. As to my living in Ponce for two or three years continuously, I don't know if it was that much, three years, because I lived there until my father died, probably up to the end of 1902. During that time, I devoted my time to my professional work, but occasionally wrote articles for papers in favor of my country. Yes, sir, I was a member of that first Legislature in the Island. During all
172 that time, I never knew plaintiff; nor heard his name. I do not remember the discussion of the big pier fight in the Legislature. If I heard of plaintiff as Judge of the United States Provisional Court, I don't recollect. I am telling the truth. In my profession as newspaper man, I hear many names and speak of many persons whom I don't remember afterwards. Upon the establishment of Civil Government and plaintiff's appointment as District Attorney of this Court, it never occurred to me, during the first three, four or five years, that he was practicing his profession as a lawyer. I never heard that the District Attorney of this Court practiced law, and as to the District Attorney in any other Court in the Island practicing law, that is a matter to which I did not pay much attention at the time, as I was not then a newspaper man. Yes, sir, I knew, personally, that R. Ulpiano Colom practiced law in Ponce while he was fiscal and I disapproved strongly of his conduct. As to my criticising him in the correspondencia for his acts, if he was practicing during 1905 and 1906, I was not aware of that fact then.

I first learned that plaintiff practiced law in private cases when he made against me a false accusation saying I had forged a will. I have a remote idea of the suit that occurred here in San Juan about the time the first Legislature was in session, about the question of granting the light franchise or light contract to the City of San Juan, but I don't remember seeing plaintiff's name in the papers as a lawyer, although I read the papers every day. I say that plaintiff accused me of forging that will more than yourself or Ben Horton or Mr. Leake or Tous Soto, because the other lawyers, in my opinion, were exercising their right and they were not the Prosecuting or District Attorneys of a Court.

Yes, sir, I was elected to the Legislature again at a later term, and as to my repealing the law allowing fiscals to practice during that session, I have not repealed any law and do not know whether the Legislature did so while I was a member or not."

Exhibit "C" for defendant was handed to witness for identification.

173 "This is the 'Porto Rico Review' of date March 2nd, 1907, and the article which commences on Page 11 first came to my attention about a month or a month and a half afterwards. Perhaps some friend called it to my notice."

Recross-examination:

"Yes, sir; I am on the exchange list of the 'Porto Rico Review,' the 'Correspondencia' is. As to my having a man in my office who immediately reads the papers on their arrival to see what articles there are of interest, it differs sometimes; sometimes we don't read

the Press until some time afterwards and sometimes we consult the Press immediately. It depends upon the topics of the day. The Correspondencia is a paper of information, which it tries to get above all when the mail comes. The papers are generally read right over when they come in; sometimes not, and there are certain papers which are not read at all. That depends upon the importance of the papers."

N. B. K. PETTINGILL being recalled as a witness in behalf of the defendant, testified as follows:

Direct examination:

"I am attorney for the Porto Rico Steamship Company, have been ever since I began to practice here after the Provisional Court ended and was such attorney during the time of my occupation of the office of United States Attorney.

Carlos Ereño is known to me and as to his being my client against the People of Porto Rico, I brought one suit for him and am not sure whether it was a contingent fee suit or not. If he had had any money I would have charged him a fee. I lost the suit and if it was contingent I was unfortunate enough to lose the fee.

I know one A. L. Arpin and was his attorney for a long while. No, sir, I did not file a suit for him against the People of Porto Rico; it was against the Porto Rico Power & Light Company, of which a copy has been filed here, and this was while I was United States Attorney.

174 Yes, sir, I know one James E. Kent and think I was attorney for him while I was United States District Attorney."

Exhibit "D" for defendant was handed to witness for examination.

"If that is a certified copy of a paper I filed in that case, I filed an affidavit similar to it, and I believe it to be true, too. In reply to your question if I admit I was attorney for him before I was removed from office of United States Attorney, I was, in the Supreme Court of the United States, but not in any Court on this Island; but I deny that I advised, assisted and counselled Kent while I was acting as United States Attorney. I deny assisting him in a professional capacity as a lawyer, but I don't deny having assisted him in a friendly way, which I think I ought to have a right to explain."

Counsel for defendant then offered in evidence said Exhibit "D" for defendant, as follows:

175 This document was offered in evidence by defendant as Exhibit D, was not admitted.

A. J. H.

In the District Court for the Judicial District of San Juan, Second Section.

I José E. Figueras, Clerk of the District Court for the Judicial District of San Juan, P. R.

Certify: That in the proceeding instituted by N. B. K. Pettingill against B. R. Dix and James E. Kent, in third party proceeding regarding title of personal property in the case of B. R. Dix against James E. Kent there is an affidavit which copied literally is as follows:

Affidavit: I, N. B. K. Pettingill, lawyer, of legal age, citizen of the United States of America.—Under oath do hereby declare, that the sum of two thousand dollars on deposit with the Honorable Clerk of the Supreme Court and at the disposal of the said Court, as a cash bond given by James E. Kent and exacted from him by the said Court to cover and guarant*ed* the legal respons*a*bilities of the appeal taken by him to the Supreme Court of the United States, from a Judgement given by the said Supreme Court of Porto Rico against the said Kent, in a Criminal Proceeding instituted against him for the crime of embezzlement, is my sole and exclusive property; and for the purpose of recovering the said money, which I do in good faith, I make this affidavit in at San Juan, Porto Rico this 21st day of April 1908. (Sgd) N. B. K. Pettingill.—Subscribed and sworn to before me on the said day and date.—(sgd) Enrique Gonzales Darder, Notary Public.

And in accordance with law I certify these presents in Porto Rico on December 14th, 1908.

JOSÉ E. FIGUERAS, *Clerk*,
By F. G. PEREZ ALMIROTY,
Deputy Clerk.

176 En La Corte de Distrito del Distrito Judicial de San Juan Sección Segunda.

Yo, José E. Figueras, Secretario de la Corte de Distrito del Distrito Judicial de San Juan, P. R.

Certifico: Que en el procedimiento seguido por N. B. K. Pettingill contra R. B. Dix y James E. Kent sobre Tercería dominio de bienes muebles en el caso de R. B. Dix vs. James E. Kent existe una declaración jurada que copiada leteralmente dice asi:

"Declaración Jurada.—Yo N. B. K. Pettingill, abogado, mayor "de edad, ciudadano de los Estados Unidos de America.—Declaro "bajo juramento en este escrito, que es de mi sola y exclusiva pro- "piedad, la cantidad de dos mil dollars que están depositados en "poder del Hon. Secretario del Tribunal Supremo de Puerto-Rico, "y á disposición del mismo Hon. Tribunal, en concepto de fianza "metálica prestada por James E. Kent, y exigida á este por el ex- "presado Tribunal, para responder y garantizar todas las resultan- "cias legales, en la apelación que dedujo para ante el Tribunal Su- "premo de los Estados Unidos, de la sentencia dictada por dicho

" Tribunal Supremo de Puerto-Rico, contra el mencionado Kent,
" en causa que se siguió á éste por el delito de Abuso de Confianza;
" y al efecto de llevar á cabo la reclamación de dicho dinero, la cual
" hago de buena fé, firmo la presente declaración jurada en San
" Juan de Puerto-Rico á los 21 días del mes de Abril de 1908.—
" (firmado) N. B. K. Pettingill.—Jurado y firmado ante mí en la
" misma fecha mes y año (firmado) Enrique González Darder.—
" Notario Publico.

Y á los fines que sean de ley expido la presente en Puerto-Rico á 14 de Diciembre de 1908.

[SEAL.] JOSÉ E. FIGUERAS,
Secretario.
F. PERES ALMIROTY,
Sec't. Aux.

D 14/908.

177 Counsel for plaintiff objected to its admission alleging its incompetency and immateriality to the issues herein.

The Court sustained the objection and defendant noted his exception to the ruling.

"I cannot tell exactly how long I have known Mr. Kent; probably since some time in 1902. During the time he was in trouble, I refused to advise him professionally, but not because I didn't think I had a right to. I have known upright attorneys prosecute in one Court and defend in another. He got other attorneys—one was Mr. Anderson, who dropped out, when he, Kent, again asked me to take it and I refused. Then he got Mr. Perez Moris, but when the case got to the Supreme Court of the United States when only questions of law could be contended for, conceiving that the Supreme Court of Porto Rico had made errors of law, I felt that it was not only right, but more than right, to advise Mr. Kent. As to whether this was before or after I was District Attorney, I am sure that I began the representation while I was District Attorney, but am not clear as to whether it wound up after my removal or not. As to whether I received a certain promissory note while United States District Attorney in this Court from the hands of Mr. Scoville, yes, I received such a note, but don't remember from whose hands I received it. I knew certain circumstances under which the note was given. I thought I knew the facts, but, of course, I only knew them from hearsay in the sense of hearing them from other gentlemen in whom I had confidence, and, in my judgment, the giving of that note did not involve a crime against the United States.

With reference to the grand jury still being in session at that time, I think they adjourned that day, although they had not actually adjourned. I did not report that matter to the grand jury, because I did not think it my duty to do so."

The COURT: There has been a good deal said here about a previous incumbent of this bench. Did the Government of the
178 United States ever authorize you to prosecute him, and why so?

"The Government of the United States, so far as I knew, except in my person, never knew anything about it. I did not consider that a crime had been committed and I so expressed myself in Judge Hord's presence at the time. I acted for the very purpose of preventing any chance of a crime being committed and I think I accomplished that purpose.

The first reported to me about this matter was over two years ago. It was not reported to the Attorney General of the United States, because the Judge, at the request of all the leading members of the Bar—that might be a reflection on some of the others—of many of the leading members of the Bar, presented his resignation upon the suggestion that it would be a proper course. In my judgment, no crime was committed and I never believed the party in question intended any wrong, but he was certainly guilty of putting himself in a false position. Yes, it was a grave impropriety and ended his usefulness as the Judge of this Court, but that there was any actual violation of the law I tried my best to avoid and I think I succeeded out of not only respect, but regard for an old gentleman whom I considered to be acting out of force of habit without any intention of taking any advantage of the situation.

As to whether the action of Judge McKenna did not consist in soliciting money from a litigant in the course of a case, if you mean in the course of a case or during the time a case was pending in this court where the litigant was one of the parties, yes. Litigant was connected with the bank, but I want to say in explanation of that, such an act as that may be, and, in my opinion, was with an innocent intent. I do not know whether I am smirching his reputation by saying it, but I think he frequently made use of his friends in this way and that is the way he got along. I think it is an act capable of two constructions, either innocent or not innocent, and my course of action was for the purpose of not allowing him to ripen it into a crime and I did not think he did. On that account before any money was delivered or any final action was taken in the
179 case, it was withdrawn or so arranged so it would not be considered or so he would not have it to decide. Yes, sir, the case was on trial at the time, but all action was at once suspended, and the money was paid after the arrangement had been made that it should be paid, the note being turned over to me and afterwards paid. No, sir, I did not report it to the grand jury, as I think it would have been an outrage to have done so and he would not have been convicted of anything.

Cross-examination:

"It is a fact that I was President of the Bar Association at that time and the course of this action was determined at a meeting of at least seven or eight members of the Bar. It is also a fact that every member of this Bar sought to avoid publicity or to in any manner injure the old gentleman."

On defendant's cross-complaint:

"Yes, sir, as an attorney, I filed this suit against defendant ac-

cusing him of forging a will. I have also testified that that suit was dismissed before this Court for matters of jurisdiction. I remember the matter of correspondence between the Attorney General of the United States and myself, and before sending that letter to his office, I showed it to only one person, I think—Mr. George H. Lamar. I drew it and delivered it to the Attorney General's office in the City of Washington. As to showing it to Mr. Lamar as my friend or my lawyer, I don't think that I distinguished. He is a lawyer whom I have always consulted whenever I needed assistance in the Supreme Court. I think you might say it was shown to him in both capacities. Yes, I think I did show that letter to other people after I got back to Porto Rico. I may have shown it to Mr. Bothwell; I would not say that I did not, but I haven't any distinct recollection. Naturally, I showed it to Mr. Leake and very likely I did show it to Mr. Cornwell, but I have no distinct recollection and don't know whether I did or not. I don't think I showed it to Judge Sweet, as we were not at that time as intimate as we have since become."

180 Exhibit "E" for defendant was here handed to the witness.

"I could not say at this distance of time. I have not read that letter for I don't know how long and I could not say whether that is verbatim. I have no doubt that at the time it was published, it was substantially a copy. There may be mistakes in it. The remark of the Court gives me the right to say at this point that with this publication in the Review I had absolutely no connection whatever. It was not only not published by my procurement, but it was published against my protest in this paper."

Exhibit "E" for the defendant was then offered in evidence, and, over the objection of the plaintiff, and exception noted, was read to the jury:

181 EXHIBIT E FOR DEFENDANT.

"The Porto Rico Review," Feb'y 23, 1907.

The Pettingill Correspondence.

Letter from the Attorney General of the United States and Judge Pettingill's Reply.

OCTOBER 23, 1906.

SIR: By direction of the President, I bring to your attention, for such explanation as you have to make:

First. The allegations in the bill *of* equity of Arsene L. Arpin against The Porto Rico Power and Light Company, in which it is charged that the Executive Council has been guilty of fraudulent and corrupt conduct in the granting of a franchise to the respondent corporation.

It is suggested that charges of that kind ought to be suppressed or are not appropriate for inquiry and decision in the courts of law: but the point is that an officer of the United States, deriving his powers from the same kind of an appointment as the Executive Council, ought not to make them.

Second. To the charge that, while United States Attorney, you have brought actions at law and in equity against the Government of Porto Rico, the point being that it is not consistent with the proprieties of your office that that should be done.

I should be glad to hear from you at an early date.

Very respectfully,

WILLIAM H. MOODY, *Attorney General.*

N. B. K. Pettingill, Esq., United States Attorney, San Juan, Porto Rico.

182 EXHIBIT E FOR DEFENDANT.

WASHINGTON, D. C., *November* 9, 1906.

The Attorney General, Washington, D. C.

SIR: Learning that the Executive Council of Porto Rico had recently, during my absence from the Island, passed certain resolutions calling the attention of the President to the allegations touching certain actions of that body contained in the bill of complaint filed by me, as counsel for the complainant, in the suit of Arpin v. Porto Rico Power and Light Company, in the United States Court for Porto Rico, and being in the States at the time upon vacation, I came to this city to meet any criticisms of my conduct which said resolutions might contain, and, upon calling at the Department, was furnished with the copy of the letter which had been mailed to me, directed to San Juan, on October 23rd last.

As I understand your letter, I am desired to explain my views, and in effect to defend my conduct upon two propositions:

First. The propriety of my appearing in Court as counsel for a private client, the protection of whose rights require the assertion of facts involving criticism of the Acts of the Executive Council, or its Committees, no matter how well founded such allegations may be, or how eminently proper to be placed before the court, if made by counsel not occupying the position of United States Attorney for that District.

Second. The propriety of bringing suits, as a part of my private practice, for clients having claims against the Insular Government, technically known as the "People of Porto Rico," while holding the position of United States Attorney there.

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Permit me to discuss these proposition in their inverse order, as a clear understanding of the principles involved in the second will, I believe, aid us in properly considering and determining the first.

I deem it proper to say, at the outset, that this second question presented itself to me soon after I assumed the duties of my present

office, more than six years ago, and was not resolved without careful consideration, nor in any selfish spirit, nor was any desire for personal gain the dominant motive. I gave the matter serious thought, and the conclusion at which I arrived and upon which I have since acted, involved the following considerations: The Civil Government Act for Porto Rico created two separate and distinct systems of courts, whose respective functions are practically identical with those of the State and Federal courts in the States themselves, and also provided for an Attorney General of Porto Rico and an Attorney of the United States for the Federal Judicial District, whose functions and attributes are as well defined and as distinctive as though deriving their powers from separate sources, as in the States. The United States Attorney, in his official capacity, has no connection with, nor is he required by law to perform any service for the "People of Porto Rico". His duties are confined to the representation and protection of the Federal authority, and, officially, he comes in contact with the Insular Government only when called upon to advise the Federal officials touching their duties and responsibilities to the United States Government as against it.

The general principle that a United States Attorney is at liberty to practice his profession, in matters not in any way inconsistent
184 or interfering with his official obligations, is generally recognized and seems to be recognized and not questioned by your letter. But, unless we are to entirely ignore the ethics of our profession and the responsibilities as a member of the bar and officer of the court as such, with that privilege goes a corresponding duty, which is to protect and defend, by honorable endeavor, the rights of all those who desire our services and are ready to *od*fer reasonable conditions of employment. No man can truly say I have ever solicited his business, and especially have I refrained from indicating any desire to obtain business which would involve litigation with the Insular Government; but on the other hand, at the time of my first consideration of this subject, it seemed, and still seems, to me that it would not only be inconsistent with the obligation of my profession but would also produce an unfavorable impression among the Porto Rican people, had I assumed the attitude that my position as the representative of the United States Government precluded me from assisting individuals, who believed they had suffered injustice at the hands of the Insular Government, in the assertion of their claim of right against that Government through the proper judicial channels. Would those people not have been warranted in concluding that such a position was assumed at the instance of my superior, and hence that a government which required or approved such action was not sincerely desirous of providing equal justice for all; and that if claimants turned to seek assistance from another lawyer presumably of no more ability and standing, a way would also be found to render his efforts futile? Especially might this be true in a community like Porto Rico, where the people were receiving their first lessons in republican-government, and where the number of American attorneys practicing before the courts was limited to scarcely more than a dozen.

185 I have always believed the true policy of a government to be a willingness of its part to submit all proper controversies to judicial determination, and such a disposition is particularly important under conditions such as have existed in Porto Rico since we became responsible for its welfare; and, if it occurs to the President to inquire the reason for the apparent unwillingness of the Executive Council in this instance to be criti-zed even in a legitimate manner by a particular individual, the underlying motive can only be found in the political situation in Porto Rico, proof of which appears in the proceedings of the Executive Council itself and can be produced when-ver necessary. At present it need only be said that the question of the bringing of suits by me against the Insular Government is presented only as an incident, to add strength to the other matter of the Arpin suit, the animus of which will be explained under the discussion of the second proposition.

I submit the foregoing as an outline of the reasons leading me to the conclusion that I not only had a right to bring suits in my private professional capacity against the "People of Porto Rico", but that it was also best for me to do so as a matter of public policy, although I would have preferred not to accept this character of litigation.

I understand that, among the papers presented to the President in connection with the point of view under discussion is a list of the suits which I have brought against the "People of Porto Rico", or its representatives. An inspection of the list, if it is complete, will show that such suits have been brought by me as attorney in private practice at intervals during nearly the whole of my incumbency of the office of United States Attorney, during the period covered by the administration of such governors as Charles H. Allen and
186 William H. Hunt, and such Attorneys General as James S. Harlan and Willis Sweet, yet no suggestion of impropriety has ever to my knowledge been made previous to this time. But on the contrary my relations with all the gentlemen above named were always cordial and I believed they welcomed my endeavors, when amicable adjustment was impossible, to obtain judicial determination of points of difference so that justice might be done.

I believe I have above sufficiently dwelt upon the considerations involved in the second proposition to make it plain that no good purpose would be served by my refusing to take charge of the interests of clients who think they have suffered injustice from the Insular Government. If they have indeed so suffered, that government should not object to making reparation, nor to having such claimants represented by any counsel, whether holding official position or not, so long as his efforts are properly directed to the furtherance of justice. If the claimant has not suffered injustice, there is no danger but that the courts will so find and the government be vindicated in the most satisfactory and conclusive manner.

If there be an intention on the part of the Executive Council, although not specifically appearing, to intimate that I have acted in any way improperly or unprofessionally in my conduct of any of these suits, or have failed to be entirely fair and courteous to the In-

sular Government or its representatives, I desire to enter a direct and positive denial to any such intimation and to challenge proof thereof.

In a government like Porto Rico where the American lawyers are few and where the people have been accustomed for centuries
187 to the tyranny of an arbitrary government, and where we should be trying to prove by example the beneficence and equality of citizens under a republican form of government, the duty of an American member of the bar is higher and its full performance more important than in those Territories where the people all speak the mother tongue and have generations of civic intelligence behind them, yet the precedents show that in the Territories and the District of Columbia it has been a recognized custom for United States Attorneys to represent interests opposed to that of the Territories.

(Continued.)

188 EXHIBIT E CONTINUED FOR DEFENDANT.

(From the "Porto — Review" of March 2, 1907.)

The Pettingill Correspondence.

Letter from the Attorney General of the United States and Judge Pettingill's Reply.

(Continued.)

From the hasty investigation which I have been able to make, I cite the following instances:

The example nearest at hand is the District of Columbia, which has a dual system of prosecuting attorneys, such as exists in Porto Rico, and has existed in most, if not all, of the organized Territories. In the case of Parsons v. District of Columbia, 8 D. C. App. 391, decided in April, 1896; Burgdorf v. District of Columbia, 7 D. C. App. 405, decided in 1895; and Smith v. District of Columbia, 12 D. C. App. 33; decided in 1897, Honorable A. A. Birney, during that time United States Attorney within the District, was of counsel for each of the above litigants against the District of Columbia. And in Mattingly, Trustee, v. District of Columbia, begun March 29, 1905, and still pending in the Supreme Court of the District of Columbia, at Law No. 47,615, as in Kelly v. District of Columbia, begun August 28, 1905, and No. 47,927 of the Law Docket, Honorable D. W. Baker, the present United States Attorney for the District of Columbia, appears as counsel against said District.

In the case of Dougherty v. People, 1 Col. 514, L. C. Rockwell, Esq. appears as counsel for the plaintiff in error during the year 1871 and the early part of 1872, at which time he was United
189 States Attorney for the Territory. In the Case of Montana v. Whitcomb, 1 Mont. 359, C. Hedges, Esq. was of counsel for defendant, who was then appellant, in the year 1872, while holding the office of United States Attorney for that Territory.

In New Mexico v. Webb, 2 N. M. 147, Sidney M. Barnes, Esq., represented Webb as the appellant, in a murder case in the year 1881, while he was holding the office of United States Attorney for that Territory.

In Hackett v. Territory, 5 Ariz. 251, E. E. Ellinwood, Esq., was Attorney for the appel-ant in the year 1897-1898, while he was United States Attorney.

In Cutler v. Territory, 8 Okla. 101, B. S. McGuire, Esq., was the counsel for defendant in a perjury case in the year 1899, while he was Assistant United States Attorney for that Territory. And in Finley v. Territory *ex* rel, Keys, a mandamus case, Frank Hall, Esq., was of counsel for Finley, in the year 1903, while Assistant United States Attorney for that Territory.

These precedents seem to be ample to show that the right and propriety of United States Attorneys representing interests antagonistic to the territorial governments has been recognized and acted upon without, so far as I am advised, ever being questioned.

I therefore feel confident that, upon full consideration of the question above discussed, you will agree with me that the complaint or criticism of the Executive Council in that regard is not well founded.

Passing now to the consideration of the point first stated, it seems to me clear that the conclusion upon the second point necessarily included the disposition of the first. If it be proper for the
190 United States Attorney to represent clients in suits directly against the Insular Government, there can be no reason why he should not represent clients in suits which are not brought against it, but merely involve attacks upon the legality or validity of some of its acts.

In the case of Arpin, which is the one directly involved, my client has been for more than seven years a persistent and consistent applicant for a franchise to develop the Comerio water power, as it is commonly designated, and for more than six years I have represented him as his attorney in the contest. The controversy has all the time involved the question of proper construction of the laws relating to public waters as well as the extent of the powers of the Executive Council relating to the granting of franchise under the law of Congress governing that subject. Twice before has the Council grantd a franchise to a competing applicant, and twice has my client applied through me to the courts for relief; yet no question has been previously raised of my right to represent him or as to the propriety of my doing so. The features of the present bill of complaint are quite similar to those in the previous suits, the only considerable difference being the addition of allegations of unfairness in the proceedings of the Franchise Committee of the Council in rejecting his bid, then changing the conditions of the competition in such manner as to prevent his bidding, and therefore awarding the franchise to the only party who could possibly bid under the changed conditions, upon terms *less advantageous to the Government or the people* than those offered in the rejected bid. The truth of all these allegations appears from the records of the Franchise Committee

itself, copies of which are filed in the suit. The only further
191 allegation is that the members of the Committee were induced to follow the course above outlined by a desire to favor the successful bidder; and, while this allegation was made upon information and belief only, the record facts seem sufficient to support it as a reasonable deduction, since no other reason has been given or suggested for pursuing such a course.

It is further worthy of note in this connection that the Arpin complaint, verified on behalf of the complainant by his agent, was filed as long ago as March last, from which time the members of the Council have been fully cognizant of the allegations contained therein affecting them, yet no complaint was then made that my appearance as counsel for the complainant was in any way open to criticism. It took the Council six months to discover that such action on my part involved an alleged impropriety; and even then the discovery was made only under the whip lash of a Porto Rican editor whose only motive was personal animosity towards me because I had, in a suit brought by me as counsel for a private client, preferred a charge against said editor of having forged a last will and testament in favor of his wife for a share in an estate of large value. That the action of the Council was based upon the articles published in the newspaper belonging to the individual, and not at the instance of any party to the litigation, appears in their own records.

I submit with confidence that I have been guilty of no impropriety whatever, but on the contrary, in representing my client and bringing before the court for investigation matters claimed to be true by him under oath, and apparently supported by record evidence, I have performed a duty incumbent on every attorney and which an attorney who has the standing to obtain and is worthy to fill,
192 the position of United States Attorney, should be last to avoid. Can that conclusion be altered by the fact that the officials who are the subject of these allegations are appointed by the same power as the United States Attorney? Surely not. Suppose, for instance, that before the final action of the Executive Council granting this franchise, facts similar to those alleged in this bill had become known to some member of the Council not a member of the Franchise Committee, would it not have been his duty to inform his fellow members of these facts during the consideration of the grant by the Council, to enter a protest against such unfair action, vote against it himself, and to persuade his fellow members to discountenance it by their vote? And could a member avoid that obligation and satisfy his conscience by remaining silent on the plea that because all the members were appointed by the same authority they should not criticize one another's acts? The statement of the proposition is but to answer it. Yet it is contended that a lawyer, because he is United States Attorney, is not at liberty to do, in a proper legal proceeding before a competent court, that which it would have been the duty of the Councilmen themselves to do, had the matter then been within their knowledge.

I go a step further and suggest that such liberty of action on the part of the public officials is necessary to the full confidence of the

people in the integrity of their government; and that, far from being injurious, such action conduces as much as the faithful performance of official duties to the true welfare of a government and the high respect in which it should be held by the people. If the criticism is unwarranted, it will react to the discredit of the critic, otherwise it should be welcomed and made the basis of righting the wrong done.

193 The resolution adopted by the Council intimated some desire that the charges made against them in the Arpin suit should be investigated by the President or some one under his authority. If the suit now pending shall be disposed of without involving a judicial investigation of the charge, both my client and myself will welcome any impartial investigation which may be proposed; but, so long as there is a chance of obtaining a judicial determination of the facts, I know of no better or more satisfactory method than that supplied by a court. When any investigation other than a judicial one is made, it should be broad enough to cover not only this particular case but all franchise matters wherein other parties may have grounds for complaint of the methods employed in the making of such grants in Porto Rico, and I fear that the Arpin case will not stand alone.

I heartily agree with the suggestion contained in your letter that charges of the kind referred to ought not to be suppressed and that it is appropriate that they should be properly inquired into by courts of law; and I am convinced that any other course than that pursued by me during the time I have been United States Attorney would necessarily, under the peculiar conditions existing in Porto Rico, have tended towards such suppression.

So far as I am personally concerned, my whole record as an official, as a lawyer and as a citizen is open to inquiry and must stand without apology or concealment, being conscious that the motives which have actuated me and the proper deference I have always shown towards officials and citizens alike have merited and won the confidence and esteem of all those whose personal frailties or in-

194 terests have not been such as to lend bias to their judgment or venom to their resentment.

Very respectfully yours,

(Signed) N. B. K. PETTINGILL,

United States Attorney for Porto Rico.

195 "Yes, the case filed by me in this Court against defendant was dismissed on a plea to the jurisdiction and was rebrought in the Insular District Court for the District of Ponce. I was one of four attorneys in the Ponce suit."

The following question was then asked the witness:

Q. And what became of it there?

Counsel for plaintiff objected to the question on the ground that it was not material to this case what was finally decided in the case charging defendant with forging a will.

The objection having been sustained by the Court, defendant

offered in evidence a certified copy of the proceedings in the Ponce District Court, (Exhibit "F" for defendant,) as follows:

A certified copy of the judgment of the (Insular) District Court of Ponce in favor of defendants in the case of Francisco Antongiorgi Franceschi v. Manuel Zeno Gandía et al., from which it was agreed by counsel that an appeal was taken to the Supreme Court of Porto Rico & that said appeal was dismissed for delay in filing record and that the time for appealing from the same to the United States Supreme Court has not yet expired.

196 Counsel for plaintiff objected on the ground of immateriality.

The Court sustained the motion and defendant noted his exception to the ruling.

Cross-examination on Defendant's Cross-complaint.

"Yes, I am quite sure I showed this letter to Mr. Leake, who was my partner and also my associate in the Arpin case. I am also inclined to think I showed it to Mr. Bothwell, who is an old time friend of mine, and I would show him anything I thought he was interested in. He was an executive officer of the Provisional Court when I was Judge of the Court.

I would like to make an explanation as to what the actual circumstances were of that publication in the Review. This publication was made at the instance of my client, Mr. Arpin. He asked my permission to do it and I told him I did not want it done, as never in my life had I been in favor of any controversy with which I was connected being fought out in the newspapers. I had never approved of it, but he said he thought in justice to himself and his position, my reply ought to be placed before the People of Porto Rico by a publication in some newspaper in circulation in Porto Rico. I then told him if he took that view, I had no means of preventing it, and if he thought it was necessary to the due protection of his rights and the understanding of his position before the people, that was his responsibility. Those are the actual facts in regard to that publication."

Redirect examination:

"As to my furnishing Mr. Arpin a copy for the Review, I had sent him a copy from Washington, which I thought was my duty. I did not have to furnish him a copy for the Review. I don't deny my knowledge of the publishing, because he said he was going to publish it. I simply expressed to him my desire that it be not published and he then went on and published it with my knowledge.

With reference to my having any animus against defendant at that time in the publication of the letter, I had not the slightest.

I showed the letter to no one except for the purpose of
197 justifying my position. I didn't get back here until ten days before I was removed and the publication was after my removeal, and all my friends wanting to know what my removal

was for, I told them that was my defense. Personally, I have not now and never had any animus against defendant except that I have always felt that he did me an injustice, but that had nothing to do with showing that letter.'

MANUEL ZENO GANDIA being recalled as a witness in his own behalf, testified as follows:

Direct examination:

"As to the effect that was occasioned, as far as I am concerned, by the publication of this article against me or charge against me of having forged this will, I consider it was derogatory to me.

A great many friends and acquaintances of mine visited me and asked what I thought about the insults that had been preferred against me. I represent in politics in my country a prominent place and some newspapers of the opposite party published some reticenses, which, although not clearly stated, revealed sufficiently the meaning, the intent. From that time, I have been the object of several anonymous communications wherein insults have been emitted at me. Some letters have been sent to some editors of newspapers in San Juan, sending letters and offering sums of money. As to their connection with the accusations in the papers of the suit, I understand that that accusation has been the cause of these injuries of which I have suffered, because these anonymous communications were received by me after the accusation and because they referred to that fact; they als referred to the will and to some other political questions."

Cross-examination:

"It is not the article as a whole in the 'Porto Rico Review' that I claim has hurt me, but that part wherein it states I was accused of having forged a will, and as to my complaining of any other publication except the one in the Review, I have no knowledge of any other article having been written; I am not aware of it."

198 And thereupon, both sides having closed their testimony, and counsel for both parties having addressed the jury, the Court charged the jury, as follows:

199 *Instructions to the Jury.*

GENTLEMEN OF THE JURY: You have now heard all of the evidence and the arguments in these important cases, or in this important case, because both causes of action have been consolidated by an order of the Court, and as you have seen, have been tried together before you. Laying all other matters aside and throwing out of our minds the feelings of the respective parties, the Court and the jury should each approach its decision with a mentality analogous to the calm level of the sea from which all heights and depths are measured.

The plaintiff sues the defendant for having, as he claims, grossly

libeled him both as a man and as an attorney of this Court and a United States Attorney of the Island of Porto Rico, and lays hi damages in the sum of Fifty Thousand Dollars. The defendar answers the complaint and denies a large portion of it, and insist that as to the balance he only made such reference to the plaintiff a he, the defendant, had a right to make in the way of reasonabl comment upon the actions of the plaintiff as United States Attorne for Porto Rico. The defendant further sets up in the way of counterclaim against the plaintiff's damages and independently o them a cross-complaint which he adds to his answer and files wit it, and alleges that he in turn has been libeled by the plaintiff b reason of the plaintiff having published or caused to be published gross libel upon him by showing it to strangers and publishing or causing it to be published in the "Porto Rico Review," and asser that the matter involved in such publication grew out of the matter and things involved in the complaint of the plaintiff, and asser that such publication by the plaintiff of this matter against hin the defendant, was not at the time privileged and was, as he state intentionally malicious and wholly unnecessary in plaintiff's de fense of himself. As to this the defendant alleges that he has bee damaged in the sum of Seventy-five Thousand Dollars, and ask first that the same be set off against the damages, if any, which shal be found by you in favor of the plaintiff, and further, that in such event he have a judgment over for the surplus, and if, as h
200 alleges, he shall be found not to be liable to the plaintiff i any damages, that damages be found in his favor for such sum within his claim as the evidence may show to be proper. O course, gentlemen, the fact that the parties here claim these larg amounts against each other, is no reason why you should gran either of them any such vast sums by your verdict or in fact an sum at all, unless under the facts as you shall find them, after yo have applied the law thereto as here given you, they or either o them shall prove to be entitled thereto. These amounts claime in complaints are simply a limit beyond which juries cannot go i their verdicts and sometimes they are placed by the parties or counse at a sum which it would be reasonable to recover, and at other time they are placed high and even out of all proportion to any possibl damage that has accrued to either, but as to the amount of damage whether the same shall in any case be nominal or substantial, th Jury under the instructions of the Court is the Judge. The law an the facts that surround this case are so peculiar, gentlemen, and th evidence has been such as that it is incumbent upon the Court t make a proper statement for your information and your guidance

The situation of this particular Court under national law is pecu liar. Nowhere else under the flag is there such a Court save in th Territory of Hawaii, and even in that case, as we understand it, th entire cost and expense of conducting the Court and the paymen of all salaries connected therewith is made as in all other cases ex cept in this Island of Porto Rico, directly from the Treasury of th United States. It is hoped that Congress will correct this, as to thi Court and thus place it on the same footing as like Courts elsewhere

There are in the Nation two systems of Courts one system that belongs entirely to each sovereign State itself and which is wholly independent of, and has no connection with Courts of the United States. There is also spread over the entire Nation in the States a system of United States Courts beneath and subject to the Supreme Court of the United States. These consist of District Courts, Circuit Courts and the Court of Appeals of the United States.
201 Their jurisdiction is strictly defined by law and the judges thereof are appointed for life or during good behavior, while the United States Attorneys under them are appointed by the President and confirmed by the Senate for terms of four years or their sooner removal by the Executive for cause. In all the Territories of the Nation since the days of the creation of the first Territory, except in the case of Hawaii and Porto Rico, there has been but one system of Courts which acts both for the national and local Government, each paying part of the salary and expenses thereof. In this Island Congress followed its procedure in the case of Hawaii and established the District of Porto Rico and created this District Court of the United States to have jurisdiction therein, and provided a United States Attorney for the District the same as is usual.

At this point the Foraker Act makes a radical and anomalous change, in that instead of providing that the salaries and expenses of this Court should be paid directly out of the National Treasury, as is customary, it provided that such salaries and expenses should be paid on the warrant of the Auditor of the Island countersigned by the Governor. This peculiar provision was evidently inserted because in that very same law, Congress had done what had never before been done with reference to any Territory beneath the flag, that is, it gave to the Island a vast sum of money annually that as to all other Territories goes only into the National Treasury, and becomes national revenue, that is, the entire customs duties and internal revenues of the Island, and further gave the Island power to fix the internal revenues to suit itself. No other dependency or Territory has ever been blessed like this. Such other Territories have been forced to make all their internal improvements and sustain their Government, schools and colleges almost wholly from direct taxation of the property within the respective jurisdictions. Evidently Congress after having so blessed Porto Rico above all the other Territories, felt that it ought to pay the cost and expense of sustaining this Court and so that same law provided that not only should there be kept out of the funds thus collected, sufficient to pay the large number of officials of the customs department of the
202 United States who collect it, even before the funds are turned over to the Island, but also provided that after it was turned over the Island should pay the salaries and expenses of this Court. For this reason, as you have seen, it may be possible that a wholly unwarranted idea has arisen in the minds of some people, that the Island and not the Nation is sustaining this Court, although this Court as to its jurisdiction and in every other respect is absolutely independent of every official and tribunal of this Island, and takes orders from no official or department connected with the local

Government, but exercises the jurisdiction of a Circuit and District Court of the United States and additional jurisdiction as well that is specially given it by Congress as fully to all intents and purposes as does any Circuit or District Court of the United States in any State of the Union.

In fact Porto Rico is organized more like a State than are the other Territories of the Nation with the exception of Hawaii. Congress by the Foraker Act created a complete system of Government for this Island with a Governor, a Legislature and a complete judicial system of its own which are three coordinate branches of the local Government and are as separate from each other save for the peculiar position of the Executive Council as is the case in a State, and the national judicial authority, as in the States, is wholly separated from the local Government by the creation of this Court and the appointment of a Judge and a United States Attorney for the Island.

It may be added here, gentlemen, that save for the apparent incongruity, or, we might say for lack of a better word, save for the apparent humiliation of a National Court having to receive its money at the hands of local officials who audit its accounts, there is no difficulty about this financial arrangement regarding the court, and save for some friction which has now happily passed, the Court has managed to get along very smoothly with the Insular officials and they exhibit no desire to hamper it in any way regarding its work or its jurisdiction. This in short is the position of this Court without reference to what the opinion of any individual or editor to the contrary may be. This statement is made to you, so
203 as to enable you to understand the situation with reference to the facts in this case.

There is nothing in the law of the United States express or implied,—and in fact the custom has been to the contrary—that would prevent a District Attorney of the United States from engaging in the general practice of the law in the State where his district is, whenever his employment does not conflict with his duties as District Attorney of the United States, and when it is not prevented by local rules of Court or express local statute. So far as is known, Porto Rico is the only place in the Nation having a District Court of the United States where the local Attorneys-General and District Attorneys are not thus permitted to practice locally in the Courts. Therefore you are instructed that it involved no moral turpitude and there was no legal wrong denounced by law, in the action of Judge Pettingill in practicing law locally in the Island of Porto Rico at the times and in the manner in which the evidence tends to show, and he himself admits he did practice. The local Legislature, of course, might pass a law if it desired to do so, that would prevent the United States Attorney from practicing law in the Insular Courts, but it has no power to pass any law affecting his conduct in this Court, and the local law which was and is on the Statute books did not and does not apply to the District Attorney of the United States for this Island, because he was not and is not a "Fiscal" such as is referred to in the local law. Of course, gentlemen, there are some things in which every person must be the judge of

the propriety of his own conduct or action and if he chooses to do a thing that is not prohibited by law, which another thinks he ought not to do, such fact does not justify that other person in libelling him therefor. Judge Pettingill had a right under the law and subject to the possible approval or disapproval of the Attorney-General or President of the United States to choose for himself as to whether or not he would take cases as a practicing lawyer in Porto Rico, where the local Government or the People of the Island was the prosecutor or the defendant.

You are instructed, that while the law of Porto Rico pro-
204 vides that, when a public employé is libeled and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges; this means that he must prove that the acts which he criticised and with reference to which he libeled a plaintiff, were wrong in law and not that they were wrong in the opinion of the person who commits the libel, or others, and whenever a person who has libeled another, justifies and attempts to prove the truth thereof in law, if he fails to do so that fact may be considered as aggravation of the damages that may be awarded by the jury.

You are instructed that whenever one person libels another by a writing or publication, that other has a perfect right to defend himself by a like writing or publication if the same is done immediately or within a reasonable time thereafter in the regular course of the controversy, and if in so doing he does not go beyond what is a proper defense of himself, then all that he does in that regard is privileged and he is not subject to an action for thus defending himself.

Congress, which since American Occupation is the supreme judge of what is best for this Island, for reasons that were sufficient to itself, placed this Court with its three divisions here and provided that it should be conducted in the English language, and whenever it has jurisdiction it is its duty as it is yours to hold the scales of justice even between all parties and only permit the one side or the other to be weighted down as the facts and the law may warrant. Its duty is to live in peace and harmony with all the officials and all the people, upon the Island, but never at the cost of receiving orders or being dictated to by anybody.

The American system of Government consists of three distinct and coordinate branches, the Executive, the Legislative and the Judicial. Each of these branches is supreme within its own proper sphere, and has no right to encroach upon the prerogatives of the other

It is also fundamental under our system of Government and our laws, that whenever the Chief Executive of the Nation or of any State is vested with the power of appointing an official and
205 of removing him, such action of the Chief Executive of the Nation or the State is not subject to question in any tribunal, and therefore, although you may believe from the evidence in this cause that the plaintiff was removed by the Chief Executive of the Nation from his office of United States Attorney for the District of

Porto Rico, still that fact must cut no figure in your verdict one way or the other; nor can you when estimating any damage to which you may believe the plaintiff entitled, if you find for him under these instructions, take into consideration the question of his removal from office at all for any purpose, nor can you take into consideration his loss of salary because of such removal, as an element in estimating his damages. In like manner as with the Chief Executive, the Legislative bodies of every jurisdiction under our system of Government are also supreme within their own proper spheres, and therefore you cannot inquire into the motives that governed the Executive Council of Porto Rico in its action with reference to the plaintiff Pettingill, because neither this Court, or any other Court has any right to make inquiries in that regard; nor can you consider their action in estimating damages of the plaintiff if you shall find for him under the facts of this case and the law as here given to you. The Libel of Pettingill by Zeno Gandia must stand or fall on its own merits. Congress itself or the President who appoints them under it, alone has power to take action as to the motives governing the action of the Executive Council of Porto Rico and no Court can ordinarily interfere when they act within the scope of their legislative functions.

Liberty of speech and of the press has ever been highly prized by the American people, and the fathers who framed the Constitution provided strictly against the infringement or curtailing of these great human rights. Under our system of Government, and such is almost the language of nearly all of the State Constitutions, every person shall be at liberty to write or speak freely on any subject, but it is always provided that such speaker or writer shall be strictly responsible for any abuse of these great privileges. In other words,

liberty of the press can never be permitted to degenerate into
206 license of the press, and the publisher of a newspaper has no more right to libel an individual than has any other person. Newspapers owe no duty to the public that gives them any greater privilege than individuals, but it is fundamental under our system of Government that publishers of newspapers may freely criticise and comment upon the actions of all public officials as well as candidates for office when the same is done with good motives, and if such publisher goes no further in such criticisms than may be necessary or proper in fairly commenting upon or criticising such actions just as an individual might do, then the same is what has become known as a privilege of the press, and such publisher or editor is not liable therefor.

But you are instructed, that in this case the publication by the defendant Manuel Zeno Grandia, in La Correspondencia, of the several articles that have been read to you, regarding plaintiff Pettingill, when taken as a whole, have been held by this Court to be and you are instructed that they are what is known in law as libelous per se, that it, that they contain language with reference to the plaintiff that affects him in his office as United States Attorney, in such a manner as that the person libelled has a cause of action against the person who made the publication and malice in the writer is presumed in

law. Therefore, in any event, you must find for the plaintiff upon that issue and give him such damages as you may believe from all the facts and circumstances in the case he is entitled to. In estimating these damages you may take into consideration the character of both parties and if you find them both to be of high standing, then you may consider that fact as an element in estimating the damage, on the one hand the weight which would be given to an editorial by a man of high standing in the community, and in like manner the injury which would be done to a man of equally high standing and character against whom the libel is directed. In addition to this there is another element of damage known as punitive damages or smart money which it is the duty of juries in libel cases to add to the ordinary damages of the cause, and these damages it is the duty of the jury to give when they believe from a preponderance of the evidence that the person who committed the libel did it
207 maliciously and without any good motive for the public good but with direct intent to injure the person against whom the libel is directed. Therefore, if you believe from a preponderance of the evidence in this case that when the defendant Gandia published these articles that are per se libelous against the plaintiff, it was done with the intent to injure the plaintiff specially and not with any desire to do public good or to properly comment upon his actions as a public official, then it is your duty to add to the other damages and you are bound to give him such punitive damages as under all the facts and circumstances of the case and these instructions you believe him to be entitled to. This may be any such sum as you in reason, under all the facts and circumstances, think ought to be imposed upon the defendant for his malice in publishing the libel referred to. The law obliges juries to add this "smart money" damage in such cases not that the plaintiff is entitled to it inherently but as a deterrent to others against committing a like offense. In this regard, however, you are warned as to both sides of the case that it is no part of the duty of a Court or jury to become imbued with the excited feelings of either of the parties or of their counsel as to the damage that may have been done to them, nor is it any part of the duty of a Court or jury to enable either of the parties to profit or suffer unreasonably by a decision or verdict in any cause save as the same may be in accordance with the facts, the law and right and justice.

If, on the other hand, you should believe from a preponderance of the evidence that the defendant Gandia when publishing these per se libelous articles against the plaintiff he was actuated by worthy motives and in good faith believed that he was endeavoring to correct a wrong which he in good faith believed existed, and which ought to be corrected, for the public good, then this being in good faith, will prevent you from granting punitive damages and the plaintiff will be entitled to recover only the regular damages which plaintiff Pettingill suffered as hereinbefore defined to you.

A great deal of evidence has been introduced as to the allegations

which the plaintiff Pettingill inserted. First, in a certain
208 bill in equity in this Court regarding the Executive Council of Porto Rico, and second, that he put in a complaint or bill in equity, whichever it was, in this Court in a suit against this defendant. In this regard you are instructed that whenever an attorney at law draws a complaint and under the direction of his client makes allegations in the same which are sworn to by his client, such allegations are not the allegations of the attorney himself but they are the allegations of his client and the lawyer is absolutely exempt from any prosecution or suit for libel thereunder, and it is only in the rarest case and then not in all jurisdictions where the client even, is liable for any such allegations. Therefore you are instructed that such allegations in a complaint as to the attorney are absolutely privileged and no action will lie against him by the person against whom the allegations are directed.

Further, it is the law, that whenever any person makes a report to a superior office of the Government, such report even though it contains matter that is in itself a libel upon some other person, such report is absolutely privileged and the person making it is not subject to an action for damages therefor by any person not even by the person against whom the libelous matter is alleged. Therefore you are instructed, that plaintiff Pettingill in this case did not commit any libel against the defendant Gandia in or about the Antongiorgi suit or in and about the answer or report of the said Pettingill to the Attorney General of the United States, and therefore such answer or report of the plaintiff to the Attorney General of the United States, was and is absolutely privileged and unless you believe from a preponderance of the evidence that said Pettingill after the matter was all over and he had made this report to the Attorney General, that he unnecessarily and with direct intention and malice against the defendant Gandia, showed copies of his report containing such libel to others than his partners or published the same unnecessarily in the "Porto Rico Review," and the burden of proving this is on Gandia by a preponderance of the evidence, then the defendant Gandia has no cause of action at all against Pettingill and the cross complaint would be in such case entirely
209 eliminated from this action. But if you believe from a preponderance of the evidence that plaintiff Pettingill did so maliciously and with intent to injure the defendant Gandia, show and publish his said answer or report, then you are further instructed that the same contains matter that is libelous per se against this defendant Gandia, and you should in like manner find for him, and estimate his damages under the same rules as you are here instructed to estimate the damages for the plaintiff in the main issue, including smart money, but if you shall believe from a preponderance of the evidence that any showing of the said report or answer by the said Pettingill to his partner or others after the matter was all over as aforesaid, and any publication of the same was done without malice upon the part of the said Pettingill, then and in such case and in like manner the cross-complaint must be eliminated from the cause entirely, because as the communication of Pettingill to the Attorney

General was not written in malice in the first place, but was in law privileged then malice cannot be presumed in its favor afterwards, and the burden is upon Gandia to show such malice by a preponderance of the evidence. If you find under the instructions as here given you that the defendant Gandia is entitled to any damages against the plaintiff on the cross-complaint, then you may set off such damages against any damages you find for the plaintiff and if either side preponderates in the amount of damages found by you, that is the side you must find for on the whole case, giving such person only the surplus damages over and above the offset of the other side.

You are instructed that by a preponderance of the evidence is not meant that one side or the other must have the most witnesses, or the greatest number of exhibits, but it means the side on which you as fairminded and honest men, after a full, fair and impartial consideration of all the facts and circumstances of the case, believe the truth to be, and after you have applied the law as here given you to the facts of the case as you shall find them.

You are instructed, gentlemen, that the high standing of the parties or either of them as such, or the wealth or lack of
210 wealth of either of them as such, or the nationality or race of either of them as such, or the opinions of their lawyers or their friends or enemies must not cut any figure in your deliberations as to their rights as here instructed, for they both have exactly equal rights before the Court and before you under the law and under your oaths which you took when you were empanelled to try this case; neither should any of you be affected in any manner whatsoever by your acquaintance or lack of acquaintance with either of the parties or their attorneys, or their relatives, or their friends, or their enemies. It is always a species of moral cowardice in Courts and juries to be embarrassed in giving a decision or finding a verdict to such an extent as that the decision or the verdict is affected thereby. No one but yourselves are under oath to return a true verdict in this cause. No one's conscience is bound but yours. Neither has either of the parties, or their friends or enemies any right to ever question you for the verdict you may render in this cause, either now or hereafter. It would be a contempt of court for any such person to do so in your case as much as it would be for them to do it in the case of the Court itself. The only remedy for any person who may be dissatisfied after a decision or a verdict is a motion for a new trial, a motion for a re-hearing or an appeal.

It is hoped, gentlemen, that you will arrive at a verdict in this case, because these trials are very expensive to both the parties and the Government. It is not intended by this expression of hope that any juror should give up his opinion to any other juror, if he believes that an injustice would be done by his so doing, but just to show you that when you fail to agree the cause goes back on the docket, and all the work has to be gone over again in a retrial of it. It is hoped, therefore, that if any considerable number are of one opinion they can give such good reasons for having that opinion as will induce the remainder to agree with them, or vice-versa, in other words, it

is assumed, gentlemen, that you will deliberate as reasonable men and endeavor to arrive at a just verdict in the premises. You, of course, are the sole judges of the weight of the evidence and
211 of the credibility to which the testimony of any witness is entitled, and if you believe that any witness has wilfully sworn falsely as to any material fact in the case, you may disregard the whole or any portion of such witnesses' testimony.

Two forms of verdict will be given you, gentlemen, one reading; "We, the jury, find for the plaintiff Pettingill and assess his damages at the sum of $——, —— —— Foreman," and the other reading: "We, the jury, find for the defendant Manuel Zeno Gandia and assess his damages at the sum of $——, —— —— Foreman." Should you happen to find that each party has sustained damages and that these damages are equal, then nominal damages only should be given for the plaintiff or the defendant so as to carry the costs, as you may believe equity and justice require, but if you shall find substantial damages for either side within the limit of the amounts claimed, the same will be set forth in the verdict of the party in whose favor you find, by filling out the blank as here indicated

When you have arrived at a verdict, you will cause it to be signed by one of your member- whom you will choose for that purpose as foreman and all of you must return it into Court. You will be permitted to take to your room the re-written complaint, answer and cross-complaint and the answer to the latter, as well as the exhibits introduced in the trial before you. The case is with you, gentlemen.

212 Defendant, Manuel Zeno Gandia, having theretofore submitted to the Court his requests for written instructions, as follows:

Instructions Requested by Defendant Manuel Zeno Gandia.

1. The jury are instructed that the charge contained in the letter by plaintiff to the Attorney General, published in the "Porto Rico Review" and shown to Messrs. Leake and Bothwell is libelous per se and the law implies malice from the publication thereof and presumes damage to the person against whom it was directed.

2. A publication within the meaning of the law is the showing of the libelous article to a person or persons other than the person against whom the article is directed.

3. If the jury should believe that the letter to the Attorney General by plaintiff was shown by said Pettingill to said other persons or that he consented to its publication in the "Review" then the jury must return a verdict on the cross-complaint in favor of defendant Manuel Zeno Gandia for such an amount as they think he has reasonably suffered by reason of said charge, but not to exceed $75,000.00.

4. The jury are further instructed that if defendant has been shown to have had actual malice in the publication of said letter then defendant may recover exemplary damages or smart money

but in no event to exceed the amount claimed by defendant in his cross-complaint.

5. The jury are instructed that if they believe that defendant has established by a preponderance of evidence herein the truth of the matters contained in the articles in the "Correspondencia" then they must find for the defendant on the main complaint.

6. In this case the articles in the "Correspondencia" were directed against the plaintiff in his official capacity and hence the jury are instructed that the truth is a defense and if defendant has established said truth he is entitled to a verdict on the main case.

7. The official acts of the plaintiff, Mr. N. B. K. Pettingill, were subject to reasonable criticism on the part of defendant,
213 Manuel Zeno Gandia, and hence if the defendant went no further than that in said articles, then such criticism cannot be shown to indicate malice on the part of defendant.

8. The jury are instructed that in judging of the intention of defendant, Manuel Zeno Gandia, in publishing said articles in the "Correspondencia," — may take into consideration the local laws and customs in Porto Rico at and prior to the American intervention and since, governing other Prosecuting Officers in Porto Rico, and can take into consideration the training of defendant and the public sentiment in Porto Rico in the matter of Prosecuting Officers practicing in other cases and taking cases against the Government of Porto Rico.

And then and there, after having instructed the jury, as aforesaid, the Court, in the presence of the jury and before it had retired to consider its verdict herein, returned said instructions asked by the defendant, with the following statement:

"All of the above instructions requested by the defendant and cross-complainant are refused either because the Court itself in its own instructions has given the same, or substantially done so, or because the facts and the law do not warrant the giving of them, as the case may be."

And thereupon the following proceedings were had, to wit:

Mr. HORD: Before the jury retires I would like permission of the Court to take some exceptions.

The COURT: Yes, you may do so.

Mr. HORD: I would like an exception as to the refusing of these charges.

The COURT: Yes, you may note it on the note there where I refused them.

Mr. HORD: May I state my further objections to the stenographer?

The COURT: You may state them after the jury goes.

Mr. HORD: I am sorry. I absolutely disagree with that rule.

The COURT: I want counsel to understand that I have so
214 ruled on that and that I won't listen further to it. Counsel may take an exception and note them afterwards.

Mr. HORD: Then I ask an exception to Your Honor's refusal to allow them to be taken.

The COURT: No, I won't allow an exception to that.

Mr. HORD: Will Your Honor allow me an exception to the fact that you would not let me take them before the jury retired?

The COURT: No, I won't let that go in the record because it is not a fact. I won't let anything go in the record that shows that you did not get them while the jury is here because you did get them.

The jury thereupon withdrew to consider of its verdict.

Mr. CORNWELL: I simply want to note an exception as to those charges requested, which were not given.

Mr. HORD: May I note these exceptions before Your Honor?

That you charged in effect that Judge Pettingill was a Federal Officer.

2nd. That it is the custom in the United States for District Attorneys to practice.

3rd. That there was no legal wrong or moral turpitude in Judge Pettingill practicing law in this Court.

4th. That Judge Pettingill had a right to take cases in which the People of Porto Rico were prosecuting.

5th. That the justification to be shown by the defendant must be true in law, thereby limiting the scope.

6th. To the charge that the publication in La Correspondencia was libelous per se.

7th. That in any event the jury must find for the plaintiff Pettingill on his complaint in some amount.

215 8th. That the defendant in this case must prove on his cross-complaint the direct intention on the part of Mr. Pettingill and malice on his part against Gandia in the making of the publication against him and that that malice must be proved by the defendant Gandia; and refusing to charge the jury that the law presumed malice from the fact of the publication.

9th. In charging that if the showing to other persons by Judge Pettingill of this letter was done without malice, then that the cross-complaint must be eliminated unless Mr. Gandia proved the existence of express malice. In addition to that, I shall file an affidavit to the effect that I asked to have all of these noted before the jury retired.

Thereafter, to wit: on the 23d day of February, 1909, and prior to the filing by defendant of its motion for a writ of error herein, defendant filed the following affidavits, to wit:

216 THE ISLAND OF PORTO RICO,
City of San Juan:

N. B. K. PETTINGILL
versus
MANUEL ZENO GANDIA.

Main Action.

MANUEL ZENO GANDIA
versus
N. B. K. PETTINGILL.

Cross-complaint.

I, Henry F. Hord, being duly sworn, on my oath depose and say: That I am the attorney at law of the said Manuel Zeno Gandia, defendant in the main action and plaintiff in the cross complaint, and as such represented him upon the trial of the said causes; that when the Court had charged the jury it instructed the Marshal of the Court to remove the jury to its room; that then and there and immediately before the jury had left the box to follow the Marshal, I requested the Court to allow me to note my exceptions to certain parts of his charge; but that before I could state a single objection to the said charge the Judge interrupted me and refused to allow me to proceed with my objections, and when I asked to have the stenographer make a note of my exception to his refusal to allow me to make and state my exceptions to his charge, he refused to allow that exception to be noted.

During all the time of the above happenings the jury were still in Court and had not started to their jury room.

Thereafter, the jury having, under the order of the Court completely retired from the Court room and from the hearing of the Court, the Judge allowed me to note my exceptions to his charge to the jury and that I then stated to the court stenographer
217 the points which appear in the record as the grounds of my exceptions to his charge as given but did not and could not go further and ask the Court to charge the jury on other points as the Court had already sent the jury to their room.

HENRY F. HORD.

San Juan, P. R., February 23rd, 1909.

Sworn to and subscribed before me this the 23rd day of February, 1909.

JOHN L. GAY,
Clerk of the Dist. Ct. of the U. S. for Porto Rico,
By C. A. DAVIDSON,
Deputy.

[SEAL.]

[Endorsed:] Filed Clerk's Office, United States Dist. Court, Feb'y 23, 1909. John L. Gay, Clerk of the Court.

218 In the District Court of the United States for Porto Rico.

ISLAND OF PORTO RICO,
City of San Juan, ss:

I, Andrés B. Crosas, being duly sworn, on my oath, depose and say:

That I am an Attorney at Law and I was present at the trial by jury of the cases of N. B. K. Pettingill vs. M. Zeno Gandia and M. Zeno Gandia vs. N. B. K. Pettingill before Judge B. S. Rodey of the District Court of the United States for Porto Rico, when the said Judge gave his instructions to the jury and immediately upon the termination thereof, instructed the Marshal to take the jury; whereupon before the jury left the box, Henry F. Hord, Esq., Attorney for Manuel Zeno Gandia arose and requested permission of the Court to allow him to note his exceptions to the refusal of certain instructions already submitted to the Court and to note exceptions of certain parts of the instructions of said Judge to the said jury; whereupon the Judge instructed the stenographer of the Court to note an exception to the refusal of the Court to charge the jury upon instructions submitted; whereupon the said Henry F. Hord, Esq., while the jury stood present in the box, asked the Court to note certain exceptions to part of his charge and shortly after the said Henry F. Hord, Esq. had begun to state his objection the Judge interrupted him and refused to allow him to proceed further stating that he had no intention of allowing this as it would be in his opinion equivalent to making another speech in order to influence the jury; whereupon while the jury — still present said Henry F. Hord, Esq., offered to make his exceptions and requested *for* further instructions to the jury in a low voice to the Court and asked permission of the Court
219 so to do, stating that it was his opinion that the decisions of the Supreme Court of the United States indicated that all such exceptions to the instructions of the Judge to the jury, should be made and noted before the jury leaves the box; whereupon the Judge refused to allow the said Hord to take his exceptions and when the stenographer was requested to make a note of his exceptions to this refusal to allow him to make and state his exceptions to the Judge's instructions to the jury, the Judge refused to allow the same to be noted, stating that he did not agree with the Supreme Court and that various attorneys of his Court had already requested him to allow such exceptions to his instructions about ten times and he was sick and tired of it and would make an example of the next one making this request and would commit him. Whereupon the jury completely retired from the Court room in charge of the Marshal and the Court allowed Mr. Henry F. Hord to note his exceptions to the Judge's instructions to the jury, which he did.

ANDRÉS B. CROSAS.

Registered No. 456.

Subscribed and sworn to before me, by Andrés B. Crosas, personally known to me, this 23rd day of February, 1909.

JULIO CESAR GONZALEZ,
[SEAL.] *Notary Public.*

[Endorsed:] Filed Clerk's Office, United States Dist. Court, Feb'y 23, 1909. John L. Gay, Clerk of the Ct.

220 And that the same may form part of the record of this case for the purpose of the writ of error herein, Counsel for the defendant, Manuel Zeno Gandia, has prepared this Bill of Exceptions and tenders the same to the Court and asks that the same may be signed and approved by the Court and be made a part of the record herein, which is accordingly so ordered and done; save that as to the occurrences directly after the Court delivered its instructions to the jury and notwithstanding the transcript from the stenographer's notes as set forth on page 57 ante, and notwithstanding the references and statements made and referred to in the affidavits on pages 60 to 63 last aforesaid, the Court does not admit that the same sets forth the exact occurrences that took place, but instead asserts that the following is its own record entered in the Journal of said date in that regard, and that the same is true and correct in all respects, that is to say:

Journal Entry, December 16, 1908.

467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

548. Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

The trial of this cause is proceeded with as on yesterday, parties and counsel being present as before, and the jury having been first called and all found present, and the taking of the evidence being concluded, the Jury hears the arguments of counsel for the respective parties as well as the instructions of the Court, at the end of which instructions counsel for the defendant and cross-complainant asks leave to object and except to certain of the Court's instructions as thus given, which leave is then and there granted, and said counsel proceeds to state his objections at length in the presence of the Court and the Jury, to the Stenographer. Whereupon, after said counsel has

stated one or two of said objections, the Court informs him
221 that it has made up its mind that it will not instruct the Jury in any other manner than as already instructed, and that his objections in that behalf are, and will be, overruled, but that the counsel may state them to the stenographer as a part of the record, but that the Jury must be permitted to retire in the meantime to which action of the Court said counsel then and there objects and requests that the Jury be kept until he has stated all of his objections to the stenographer at length as he is doing, and the Court denies this request and orders that the Marshall take the Jury to its quarters for deliberation, which is then and there done, and as they are leaving the court-room said counsel requests leave to continue the stating of all of his objections to the instructions to the stenographer which request is granted, and he then and there finished the stating of the same, to which action of the court in refusing to permit counsel to state all of his objections at length in the presence and hearing of the Court and the Jury, to the stenographer, as aforesaid before the Jury retires, said counsel for defendant and cross-complainant then and there duly objects and excepts. In like manner after the Court had finished delivering its instructions to the Jury, and before the Jury had retired, counsel for the plaintiff, stated that he desired to object and except to some of the instructions given and refused which request was then and there granted, he reserving the right to note his objections and exceptions specifically in the record.

And with this exception the said Bill of Exceptions is hereby signed and approved by the Court and made a part of the record herein.

B. S. RODEY, *Judge.*

222 In the District Court of the United States for Porto Rico.

No. 467. Law.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDIA

and

No. 548. Law.

MANUEL ZENO GANDIA
vs.
N. B. K. PETTINGILL.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing two hundred and twenty one typewritten pages, numbered from 1 to 221, inclusive, to be a true and correct copy of the record and proceedings in the above and therein entitled causes as the same remain of record and

on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 23rd day of June, A. D. 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

223 In the District Court of the United States for Porto Rico, Sitting at San Juan.

N. B. K. PETTINGILL
vs.
MANUEL ZENO GANDÍA

and

MANUEL ZENO GANDÍA
vs.
N. B. K. PETTINGILL.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for Porto Rico before you, between Manuel Zeno Gandía, plaintiff in error, and N. B. K. Pettingill, defendant in error, a manifest error hath happened, to the great damage of the said Manuel Zeno Gandía, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the Dis-
224 trict of Columbia, within sixty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23rd day of February, in the year of our Lord one thousand nine hundred and nine.

JOHN L. GAY,
Clerk of the District Court of the United States for Porto Rico.

Allowed by:

B. S. RODEY,
District Judge.

2/23/09.

Service of within writ of error and receipt of a copy thereof is hereby admitted this 23rd day of February 1909.

F. L. CORNWELL,
Attorney for Defendant in Error.

225 [Endorsed:] No. 467-L. In the District Court of the United States for Porto Rico. Pettingill vs. M. Zeno Gandía and M. Zeno Gandía vs. Pettingill. Writ of Error. Henry F. Hord, Attorney for Zeno Gandía. San Juan, Porto Rico. Filed Clerk's office, United States District Court, Feb'y 23, 1909. John L. Gay, Clerk of the Court.

Endorsed on cover: File No. 21,761. Porto Rico D. C. U. S. Term No. 278. Manuel Zeno Gandia, plaintiff in error, vs. N. B. K. Pettingill. Filed July 20th, 1909. File No. 21,761.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 97.

MANUEL ZENO GANDIA, PLAINTIFF IN ERROR,

vs.

N. B. K. PETTINGILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement of Case.

N. B. K. Pettingill, a citizen of the United States, an attorney at law, during the time of the occurrences narrated in the active practice of his profession, and prior to the institution of these proceedings for sometime United States Attorney for Porto Rico, sued the defendant Gandia (plaintiff in error here), a citizen of Porto Rico, before

the United States District Court for Porto Rico, in an action for libel.

The alleged libel was founded upon extracts from a series of articles in the Spanish language, published in a daily newspaper called "La Correspondencia," which had considerable circulation in Porto Rico.

Defendant Gandia was a manager or "director" of "La Correspondencia" and admitted having written the articles in question.

Plaintiff Pettingill alleged that the articles had been composed and published by defendant in respect of plaintiff's "profession and business as an attorney at law and in respect of his official position as United States Attorney for Porto Rico"—"maliciously intending to injure the plaintiff in his said profession and office and in his good name and reputation and to bring him into public scandal and disgrace."

Defendant having first demurred, answered, admitting authorship of the articles excerpted from, denying all allegations of malice and justified the publications on the ground that same were based upon facts known at the time to defendant, and were published by him in the discharge of his duty and trust to the patrons of his paper and to the public, and solely in the exercise "of his lawful right of criticism as a newspaper man of the official acts and doings of plaintiff as an attorney and officer of this (United States District) court and

as a public official to wit: United States Attorney for Porto Rico."

Stripped of verbiage, the charges running through the articles were that the plaintiff Pettingill while United States Attorney for Porto Rico, and while enjoying the salary attached to such office, which was paid to him out of the local revenues and treasury, in his private capacity as an attorney at law practicing before the court to which he was officially attached, accepted employment against the People of Porto Rico in both civil and criminal cases brought or pending before said court, and did aid, advise, and assist persons charged with offenses against the People of Porto Rico; and did fail to report for prosecution a certain case or cases to the grand jury of said court, and in a certain civil suit, on behalf of a personal client, did unduly attack the official acts of the People of Porto Rico, such conduct being contrary to the laws of Porto Rico and the public policy of the Island.

On the trial, the District Judge (Hon. B. S. Rodey), having first explained to the jury the general relation of the United States District Court for Porto Rico to the people of that Island with particular reference to the "financial arrangement" which led to "the apparent incongruity" or "for lack of a better word" "apparent humiliation of a National Court having to receive its

money at the hands of local officials who audit its accounts," charged the jury that the law and custom of the United States did not prevent United States District Attorneys from engaging in the general practice of the law in the State of his district, when not in conflict with his duties as District Attorney and when not prevented by local rules of court or express local statute; that, therefore, "there was no legal wrong denounced by law in the action of Judge Pettingill in practicing law locally in the Island of Porto Rico" at the times and in the manner admitted by him; that the local legislature "has no power to pass any law affecting his conduct in this court"; that the existing local laws do "not apply to the District Attorney of the United States for this Island, because he was not and is not a "Fiscal" such as is referred to in the local law; that the publications in "La Correspondencia" regarding plaintiff, "taken as a whole," were "libelous *per se*," and malice on the part of the writer was to be presumed in law; that "in any event" the jury "must find for the plaintiff upon that issue, and give him such damages" as from all the facts and circumstances he may be entitled to; that if from the evidence it appeared that the articles, libelous *per se*, were published by defendant with intent to injure the plaintiff specially and without good motive, it was the duty of the jury, and they were bound, "to add to the other damages * * * such punitive damages as under all the facts and circumstances of the case

and these instructions you believe him to be entitled to;" that the "law obliges juries to add this 'smart money' damage in such cases * * * as a deterrent to others against committing a like offense;" but if defendant acted in good faith, "endeavoring to correct a wrong which he in good faith believed * * * ought to be corrected for the public good," then plaintiff would be entitled to recover "only the regular damages" which, as previously defined, he had suffered,—with much more to like effect.

The jury, having retired for deliberation, returned its verdict for plaintiff and assessed his damages at eight thousand dollars ($8,000), upon which verdict judgment for the amount thereof, with an attorney's fee of $300 and costs and interest until paid, was duly entered (pp. 26, 27).

The case is here on writ of error to reverse this judgment, for errors of law which occurred during the course of the trial, as disclosed by the transcript of the record.

It appears from the bill of exceptions that subsequent to the publication of at least one of the articles complained of (Plaintiff's Exhibit G, R., p. 62) the Executive Council of Porto Rico recommended that the matter therein referred to, viz., certain charges made against said Executive Council and contained in a bill of complaint filed on behalf of one Arpin, by N. B. K. Pettingill, his

solicitor, against the Porto Rico Power and Light Company, be "referred to the Governor of Porto Rico for submission to the authorities in Washington with the request that they cause such steps to be taken as they may deem necessary to satisfy themselves regarding the truth or falsity of the accusations made, and for such action as they may deem best" (R., 67).

This course seems to have been pursued and after an exchange of letters between the Attorney General of the United States and plaintiff (R., 114, 115) the latter was summarily removed from office by cable on the morning of Thanksgiving Day, 1906 (R., 68).

The Statute Law of Porto Rico Applicable to the Case.

By the "Organic Provisions concerning the Administration of Justice in the Colonial Provinces and Possessions," approved and ordered published by Royal Decree of January 5, 1891 (War Department, Insular Affairs, July, 1899, Gov't P. Office), elaborate and minute provision was made for the "personnel and organization" of the Inferior and Superior Courts, such personnel including, beside presiding and associate judges (page 22), the *fiscal* (public prosecutor), his assistants and deputy assistants.

By Title II, chapter II, "Conditions Common to All Judicial Officers," it is declared—

ART. 75. The offices of judges and associate justices shall be incompatible;

1. With the exercise of any other jurisdiction;

2. With other employments or offices endowed or recompensed by the State, provinces or town.

3. With the offices of provincial deputies, alcaldes, city magistrates, or any other provincial or municipal offices.

4. With subordinate employments in superior or inferior courts.

CHAPTER III.

Conditions Common to Examining Judges, etc.

ART. 80 (Contains minute prohibitions whereby the various classes of judges are hedged in—all with a view of insuring absolute impartiality). Among others it is provided that such judges shall not exercise jurisdiction in:

1. The town where he or his wife was born, * * *

2. The town in which he or his wife has resided the five successive years previous to the appointment.

3. The town in which at the time of appointment he may pursue any industry, trade or any other remunerative occupation.

* * * * * * *

5. The town in which he practiced law for two years previous to his appointment, etc.

"ART. 83. Those who violate the provisions of the preceding article shall be considered as renouncing the office they may hold."

Title XVI (p. 92),

"The Department of Public Prosecution," declares—

"ART. 418. The Department of Public Prosecution shall see to the observance of this decree-law, shall institute judicial actions in matters relating to the public welfare, and shall act as the representative of the Government in its relations with the judicial power.

CHAPTER II.

General Conditions for All Offices of the Department of Public Prosecution.

"ART. 425. To the persons filling offices of the Department of Public Prosecution, of whatsoever rank or category, there shall be extended all the provisions established in articles 73 to 79 for judicial officers in matters referring to qualification, incapacity, absolute or relative incompatibility and exemptions from obligatory duties."

"ART. 426. The incompatibilities established in article 80 shall likewise be extended to the proper officers of the Department of Public Prosecution."

"From the provisions of the preceding paragraph there shall be excepted:

1. The *fiscales* of municipal courts or courts of justices of the peace and their substitutes.

2. The substitutes of *abogados fiscales* of audiencias.

3. Persons rendering service in the Department of Public Prosecution accidentally or provisionally.

4. Persons discharging duties of the Department of Public Prosecution in Habana.

The prohibitive provisions established for judicial officers in article 82 shall include the persons obtaining appointments in the Department of Public Prosecution, in the same superior courts, and within the same territory. Persons violating these provisions shall incur the penalty fixed in article 83. From this provision there shall be excepted the officers that are included in the first three numbers of the foregoing article."

"ART. 427. Persons appointed to offices of the Department of Public Prosecution cannot practice law. From this provision there shall be excepted only those mentioned in the first three numbers of article 426."

In an opinion dated December 16, 1901, Mr. Harlan, then Attorney General of Porto Rico, now an Interstate Commerce Commissioner of the United States, said:

"It is clear that a fiscal may not with propriety act as a notary. The act entitled 'An act relating to notarial practice in Porto Rico,' gives the right to act as notaries only to those lawyers that are 'in

the exercise of their profession before the insular courts.' It is to be fairly inferred from this language that the privilege is not open to fiscals. They are not exercising their profession, in the sense of that act; but, on the contrary, are acting in an official capacity which makes the exercise by them of the profession of notary incompatible.

"Moreover, in article 427 of the compilation of organic provisions relating to the administration of justice, translated by the War Department, July 18, 1899, it is expressly provided that persons appointed to offices in the Department of Public Prosecution shall not practice law. This is an expression of public policy in relation to fiscals which, in my judgment, would necessarily exclude the fiscal from practicing as a notary.

"In addition to this, I am strongly of the opinion that the Government should not permit those who are enjoying good salaries to engage in practice and thus to diminish the professional rewards and opportunities of lawyers who are not in official position.

"Respectfully,

"JAMES S. HARLAN.

" 'Opinions of the Attorney General of Porto Rico,' vol. 1, page 91."

By the so-called "Foraker Act" of April 12, 1910, "Temporarily to Provide Revenues and a Civil Government for Porto Rico," it was enacted,

> "SECTION 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders

> and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

Section 32 provides that the legislative authority of Porto Rico "shall extend to all matters of a legislative character not locally inapplicable," and also "to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with provisions hereof."

By section 34 Porto Rico was constituted a judicial district to be called "the District of Porto Rico," and authority was given to the President, "by and with the advice and consent of the Senate," to appoint "a district judge, a district attorney," etc., for terms of four years, "unless sooner removed by the President.

Section 36 declares that—

> "The salaries of all officers and all expenses of the offices of the various officials of Porto Rico, appointed as herein provided by the President, * * * shall also be paid out of the revenues of Porto Rico on the warrant of the auditor, countersigned by the governor."
>
> "The annual salaries of the officials ap-

pointed by the President, and so to be paid, shall be as follows:

* * * * * * *

"The United States District Attorney, four thousand dollars."

By an act of the Legislative Assembly of Porto Rico approved March 10, 1904, "Providing for the Appointment of District fiscals, Defining their Duties," etc. (Laws and Code Civil Procedure, Porto Rico, 1904, p. 122), provision was made for the appointment of a fiscal for each judicial district, defining their qualifications and duties, specifying the amount of salary each should receive and the source of its payment, and repealing all laws and parts of laws in conflict therewith.

This law contained no provision concerning the right of such fiscals to engage in the general practice of the law. But by a further act of the Legislative Assembly of Porto Rico, approved March 9, 1905 (Laws of Porto of Rico, 1905-1906, p. 123), "To Prohibit the Fiscal of the Supreme Court, District Attorneys and Municipal Judges from Engaging in the Practice of Law," it was enacted:

"SECTION 1. That the fiscal of the Supreme Court, district attorneys, and municipal judges are hereby prohibited from engaging in the practice of law; but this act shall not prevent the fiscal of the Supreme Court and the district attorneys from acting as counsel for the People of Porto Rico, or

for any public officer, as now authorized by law.

"SEC. 2. This act shall take effect from and after its passage."

Prior to February 19, 1902, the civil action to recover damages for libel and slander was unknown to the law of Porto Rico.

The Penal Code of June 17, 1870, adopted and put into effect in the Colonies, "Cuba and Porto Rico," May 23, 1879 (H. R. Doc. 1484, 60th Cong., 2d session), contained the following:

"TITLE—CRIMES AGAINST HONOR.

"*Chapter* 1.—*Calumny.*

"ARTICLE 471 (page 701). Calumny is the false imputation of a crime of those subject to prosecution at the instance of the Government (*de officio*).

"ARTICLE 472. Calumny put into writing and made public shall be punished with the penalties of *prision correctional* in its minimum and medium degrees, and a fine of from 12,500 pesetas if a grave crime be charged, etc., etc.

"ARTICLE 473. When the calumny is not made public and put into writing, it shall be punished—

"1. With the penalty of *arresto mayor,* etc., etc.

"ARTICLE 474. A person accused of calumny shall be exempt from all punishment if he shall prove the criminal act charged.

"Chapter 2.—Contumely.

"ARTICLE 475. Contumely includes every expression pronounced or action executed with a view to dishonoring or holding up to contempt another person.

"ARTICLE 476. The following are grave acts of contumely:" (Definitions follow.)

Titles IV and V, Articles 804-823 of the Law of Criminal Procedure for Cuba and Porto Rico (War Dept. Trans., 1901), specified the proceedings and the manner thereof to be followed in cases of "crimes of contumely and calumny against private individuals and public officials.

NOTE.—The theory of the Spanish law in force in Porto Rico prior to American occupation seems to have been that injuries which resulted in damages of an indefinite and intangible nature incapable of exact valuation, such as the loss of a limb, death of a member of the family, impairment of health, strength, credit, dignity, honor, reputation, and the like, were so grave as to require the criminal punishment of the author as the primary consideration, and only as an incident to the criminal proceeding was the person causing the injury, if found guilty of the crime, required to indemnify the person injured. Such injuries are included in the Criminal Code as acts to be punished like crimes and misdemeanors. And in order to recover damages it was, and in many cases

still is, absolutely necessary under the Spanish law that the author first should be found guilty in the criminal proceeding. This additional punishment or penalty is referred to in the Penal Code as a "civil liability," but it was always and only an incident to the criminal proceeding (Art. 650, p. 157, Crim. Proc.).

Article 1092 of Book IV (Civil Code, 145, War Department Translation), treating of obligations, provides:

> "Civil obligations, arising from crimes and misdemeanors, shall be governed by the provisions of the Penal Code."

And even when the injuries were caused by negligence and not by a malicious and intentional act, if they impaired the health or reputation, or resulted in the loss of life or limb, or in any intangible harm of that nature that could not be exactly valued, the result seems to have required criminal punishment and, as an incident thereto only, the allowance of the damages to be paid to the injured person.

With reference to acts not essentially malicious or criminal, the provisions of the Spanish Penal Code (pp. 125-127) contains the following:

> "ARTICLE 613. The following shall be punished with a fine of from 15 to 125 pesetas and censure * * *.
>
> "5. Those who, through mere imprudence or negligence, without committing a

> violation of the regulations, shall cause an injury which, if done with malice, would constitute a crime or misdemeanor," etc., etc.

The Spanish Penal Code also provides (p. 17):

> "ARTICLE 16. Every person criminally liable for a crime or misdemeanor is also civilly liable."

Thus, every conviction of murder, theft, calumny, etc., etc., as a seeming matter of course, was attended by an additional penalty in the way of damages, which were awarded to the injured person.

Such damages were generally included in the judgment entered in the criminal proceedings (§§ 4 and 5, Art. 142, p. 51; Art. 742, p. 182, Code Crim. Proc.), and were enforced by execution like a civil judgment (Art. 133, Penal Code), but were of such nature that they could be demanded only as an incident to the criminal proceeding. In other words, the civil demand had to be brought jointly with the criminal action (Art. 108, Crim. Proc.), and if the defendant was acquitted of the criminal charge the judgment necessarily absolved him as a matter of law from the civil liability also. If the defendant was found guilty of the criminal charge, civil liability followed as a matter of course.

The act of the Legislative Assembly of Porto Rico, approved February 19, 1902, first "Author-

izing Civil Actions to Recover Damages for Libel and Slander" (Revised Statutes and Codes of Porto Rico, 1902, p. 214 *et seq.*), is as follows:

"SECTION 1 (567). The civil action for damages for libel and slander is hereby established.

"SECTION 2 (568). Libel is the malicious defamation of a person made public by writing, printing, sign, picture, representation, effigy, or other mechanical mode of publication tending to subject him to public hatred or contempt, or to deprive him of the benefit of public confidence and social intercourse, or to injure him in his business, or in any other way to throw discredit, contempt, or dishonor upon him, or malicious defamation made public as aforesaid, designed to blacken or vilify the memory of one who is dead and tending to scandalize or provoke his surviving relatives or friends.

"SECTION 3 (569). Slander is a false and unprivileged publication other than libel, which imputes to any person the commission of a crime, or tends directly to injure him in respect to his office, profession, trade or business, or which by natural consequences causes actual damages.

"SECTION 4 (570). A publication or communication shall not be held or deemed malicious when made in any legislative or judicial proceeding or in any other proceeding authorized by law. A publication or communication shall not be presumed to be malicious when made:

"First. In the proper discharge of an official duty.

"Second. In a fair and true report of a judicial, legislative, official or other proceeding, or of anything said in the course thereof.

"Third. To an insular official upon probable cause with the intention of serving the public interest or of securing the redress of a private wrong.

"SECTION 5 (571). Malice shall be presumed to exist in any injurious communication or writing made without justifiable motive and addressed to any person other than to a relative within the third degree, or to a person whom the author has under his guardianship or when said communication passes between persons having business in partnership, or other similar association.

"SECTION 6 (572). If the plaintiff be a public employee and the libel refer to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

"SECTION 7 (573). If there be a judgment in favor of the plaintiff, the judgment shall include costs and a reasonable attorney's fee, to be assessed by the court. If there be a judgment in favor of the defendant, and if the court finds that the action was commenced by the plaintiff without justifiable cause, the judgment shall include besides costs, an attorney's fee which shall be assessed by the court and shall not exceed one hundred and fifty (150.00) dollars.

"SECTION 8 (574). To sustain the charge of publishing libel it is not needful that the words for which suit is brought should have been read by any person; it is enough and

sufficient evidence if the accused knowingly parted with the immediate custody of the libel or exposed the same to view under circumstances which allowed it to be read by any other person.

"SECTION 9 (575). Actions brought under this act shall be independent of any criminal action which may arise out of the libel or slander; but in case damages have been assessed in a criminal action for libel or slander, prosecuted by the fiscal, no civil action shall be brought to recover damages for the same libel or slander until the plaintiff has formally waived damages adjudged in such criminal action.

"SECTION 10 (576). That all laws, parts of laws, orders and parts of orders, contrary to this act be, and the same are hereby repealed.

"SECTION 11 (577). That this act takes effect from and after its passage."

Sections 130 and 131 of the Code of Civil Procedure (Laws and Code Civil Procedure, Porto Rico, 1904), chapter VII, General Rules of Pleading, are as follows:

"SECTION 130. In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

"SECTION 131. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

(*Laws and Code Civil Procedure, Porto Rico,* 1904.)

"CHAPTER V.

"*Exceptions.*

"SECTION 212.—An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding.

"Except as provided in the next section, the exception must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exception at any other time, except by the agreement of both parties.

"When an exception is taken, the court, judge, tribunal, or judicial officer shall allow sufficient time for the reduction to writing, and settlement of the same, and in case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit, and the party taking such exception may apply to the court or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so

settled, the same shall become a part of the record in such action or proceeding.

"SECTION 213.—The final decision in an action or proceeding, * * * finally determining * * * an order sustaining or overruling a demurrer, * * * shall be deemed to have been excepted to; and such exception * * * to an order sustaining or overruling a demurrer; * * * where such an order or decision and the papers upon which it is made are a part of the records and files in the action, need not, unless desired by the parties objecting thereto, be embodied in the bill of exceptions, but the same appearing in the records or files, may be reviewed upon appeal as though settled in such bill of exceptions.

"SECTION 214.—No particular form of exception is required," * * *

"SECTION 215.—A bill containing the exception to any decision may be presented to the court or the judge for settlement, at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the secretary." * * *

The Pleadings.

This action was instituted in the District Court of the United States for Porto Rico on the 8th day of December, 1908 (R., 1, and clerk's certificate, R., 138).

The publications complained of occurred on the 26th and 28th days of April, the 7th of June, the 7th of July, and the 3d day of October, all in the

year 1906. Plaintiff was summarily removed from office on the 29th day of November, 1906.

It appears, therefore, that more than two (2) years elapsed between the dates of the last publication and of plaintiff's removal from office, and the institution of this suit.

In his complaint plaintiff alleged his qualifications and occupation as an attorney at law actively engaged in the practice of his profession in the Island of Porto Rico and elsewhere, and his official position as United States Attorney for Porto Rico; asserted the confidence and esteem in which he was held, both personally and professionally, among the people of the Island; averred the relation of the defendant to the newspaper "La Correspondencia," and the malicious publication therein of the articles complained of, which articles he asserted were published "in respect of his profession and business as an attorney at law," and "of his official position as United States Attorney for Porto Rico."

In substance the article published under date of April 26, 1906, declared that "The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of a prosecuting attorney of a court and to exercise his profession," therein simultaneously; that it was "an immorality * * * repugnant to Porto Rican legislators (legislation) that a man should act as a lawyer

before the same tribunal where he holds the highest office after the judge;" notwithstanding which Mr. Pettingill had associated himself with the enemies of the People of Porto Rico, and leads them in law suits against the latter, who are obliged to pay to him his salary as prosecuting attorney of the Federal Court wherein he brings his suits against the people (R., 3).

The publication under date of April 28, 1906, is in the same vein and to the same effect, asserting particularly "that the legislative power of the Island is illegally opposed by the lawyer, Mr. Pettingill," who "is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that court" (R., 4).

The publication of June 7, 1906, is in similar vein and to like effect, adding that "The Porto Ricans will not consent to the abuse of their patience," and intimating that if Mr. Pettingill, "prosecuting attorney and lawyer at the same time and before the same court," does not "put an end to the scandal which he is producing in the country," it will be necessary to lodge a protest at Washington concerning the matter (R., 5).

The publication of July 7, 1906, refers to a conference between Mr. Pettingill and the Executive Council concerning a certain suit wherein "lawyer Pettingill, a North American gentleman, who is

Prosecuting Attorney of a North American court, * * * thinks he can exercise the duties of prosecuting attorney, collect a large salary from the Treasurer of Porto Rico, and carry on suits against the People of Porto Rico, damaging, slandering, and making light of its governmental authority" (R., 6).

The publication of October 3, 1906, refers specifically by name to the suit of Arpin against the Porto Rico Power and Light Company, wherein "lawyer Pettingill, the prosecuting attorney of the court before which the suit is being heard, and a lawyer employing himself in suits against the People of Porto Rico, is the lawyer of the plaintiff," and proceeds as follows:

> "Here it is only attempted to be shown of what quality is the Prosecuting Attorney of the Federal Court, who is a lawyer practicing his profession in a country like this in which the laws prohibit the prosecuting attorneys of the courts from practicing their profession as lawyers and the employees who receive salaries from the People of Porto Rico, to whose laws they must swear fidelity, from violating their duties by fighting against Porto Rico and insulting the corporate bodies created by the Congress of the United States and selected and appointed by the President" (R., 7).

further suggesting that the contents of the bill of complaint filed by Mr. Pettingill on behalf of Arpin "were insulting to the members of said Ex-

ecutive Council, that said plaintiff (Pettingill) had no right to make such allegations while holding the office of United States Attorney, that said members of said Executive Council owe it to themselves to resent the making of these alleged insulting charges, and that, unless action was taken by the Executive Council, the people themselves would find it necessary to ask the President and Congress of the United States to make an investigation (R., 7).

Plaintiff averred that the Executive Council, taking note of the last-mentioned publication, appointed a special committee "to report what action should be taken in regard thereto," and in conformity with the report of said special committee requested the Governor of Porto Rico to forward the matter relating to the conduct of plaintiff "to the President of the United States for his consideration and action" which the Governor accordingly did do.

Plaintiff next alleged his summary removal from office on November 29, 1906 (but does not aver that cause was the result of the above representations); that defendant in making the publications referred to had been actuated by express malice, occasioned by a certain chancery proceeding brought in March, 1906, wherein plaintiff as solicitor for one Francisco Antonngiorgi had charged defendant with the forgery of a certain will whereby defendant's wife "was to be illegally and fraudulently benefited as

an heir," etc. (R., 8); that said articles complained of "were not composed or published by the defendant in good faith or from any good motive, but were composed and published solely from an evil motive of malice and revenge against plaintiff for his connection with "said suit; that they were made with express and actual malice, by reason whereof plaintiff is entitled to recover exemplary damages" which he claimed "in the sum of fifty thousand dollars, together with his costs of suit and the attorney's fee allowed by statute" (R., 9).

Defendant moved to strike from plaintiff's complaint all references therein contained to the effect that plaintiff enjoyed the office, title, and official position of United States Attorney for Porto Rico, for the general reason that "plaintiff having been removed by the President of the United States from said office of United States District Attorney, for reasons deemed sufficient by said President, the same (such reasons) are not and cannot be made the subject of inquiry herein and hence plaintiff's removal by the President cannot be urged as an element of damage herein" (R., 9, 10-16).

The motion was overruled.

Defendant thereupon demurred generally to the complaint as rewritten;

(*a*) For want of facts sufficient to constitute a cause of action;

(*b*) Because it is unintelligible and uncertain and "improperly mixes in inextricable confusion with other so-called elements of damage alleged by plaintiff the fact of his removal by the President of the United States from his office as United States Attorney for Porto Rico," and also "certain official acts and doings of the Executive Council of Porto Rico and of the Governor of Porto Rico," all of which "are in and of themselves privileged and are not a proper subject of inquiry" (R., 17).

This demurrer was also overruled and exception to the action of the court in each instance was duly noted (R., 18).

Defendant thereupon answered denying the allegations of paragraph *3* of plaintiff's complaint, and also denying all allegations "of fraud and malice" contained in paragraphs *5, 6, 7, 8* and *9* (being the paragraphs setting forth the publications complained of) and denied that said articles were published "maliciously or with intent to injure plaintiff" in his reputation and office, and asserted that each of said articles "were so published by defendant in the discharge of his duty and trust to the patrons of said newspaper (La Correspondencia) and to the public and in the exercise of his lawful right of criticism as a newspaper man of the official acts and doings of plain-

tiff as an attorney and officer of this court and as a public official, to wit, United States Attorney for Porto Rico;" that plaintiff "occupying as he did a dual position as an attorney-at-law and officer of this court *and* as such prosecuting officer, his conduct in said capacities was and is a legal and just subject of criticism" * * * "and that no criticism was made of him in said articles, as a whole or separately, except such as was reasonable;" that "the matters and things set out in said articles in which plaintiff is charged with improper and immoral conduct as an attorney-at-law and as such prosecuting officer were justified and are justifiable and are and were based upon facts known at the time to defendant in and concerning the conduct of plaintiff as such attorney-at-law and prosecuting officer," which "conduct consisted in accepting employment against his principal, the People of Porto Rico, in both civil and criminal cases and in aiding, advising and assisting a person or persons charged with offenses against his principal, the People of Porto Rico, and in failing to report, as in duty bound, a case or cases to the grand jury of this court for prosecution, and further, in a civil suit, in attacking in behalf of a personal client, the official acts of the People of Porto Rico, his principal" (R., 19, 20).

The remaining paragraphs of defendant's answer are to like effect with reference to particular averments contained in the complaint, and contain

repeated denials to the effect that "in the printing and publishing of any of said articles, he was actuated by spite or malice towards plaintiff" (R., 20). While admitting it to be true "that not until about the 26th day of April, 1906, did defendant begin his legal and lawful criticism of plaintiff's official acts as aforesaid," * * * he alleged the truth to be "that at that time and prior thereto defendant did not understand or speak English and had no reporter who did;" * * * "and that he was absolutely and totally ignorant of and concerning" plaintiff's course of official action, "either as a practising lawyer or United States Attorney," and admitted "that his attention was first actively drawn to the conduct of the plaintiff as said attorney-at-law by an article published in the Porto Rico Review in April, 1906, concerning plaintiff and certain matters in this (U. S. district) court, and by the filing by plaintiff against him and others of the grossly libellous and untrue and unfounded suit, at the instance of said Francisco Antongiorgi;" and that "then and then only in the course of said investigations was the attention of defendant drawn to the conduct of plaintiff in the conduct of said office of United States Attorney and as attorney and officer of this (district) court, and that thereupon defendant conceived it to be his duty as such newspaper man to reasonably criticise plaintiff's official conduct, which he proceeded to do in said newspaper, all as aforesaid."

Defendant further denied lack of good faith and that "he was actuated by motives of malice and revenge against plaintiff in making said publications" (R., 21), and concluded his answer with the averment that the contents of each and all of said articles were "true (and) were published in good faith, in the exercise of defendant's right of reasonable criticism of plaintiff's official acts and go to show and make complete, defendant's justifiable action in publishing the articles referred to by plaintiff" (R., 22).

At the same time and in connection with his answer, as above, defendant filed a cross-complaint in libel, which plaintiff duly answered (R., 22–24), but in view of the course and outcome of the proceedings in the trial court, further reference to this incidental circumstance is rendered unnecessary.

The main case being at issue upon the complaint and answer thereto, a jury was empanelled and sworn and the taking of testimony was begun (R., 18).

The Trial.

On the trial the plaintiff Pettingill took the stand and gave evidence tending to support the averments of his complaint, particularly introducing in evidence full copies of the published articles

from which the extracts counted on had been excerpted (R., 45-65).

With respect to the article published under date of June 7, 1906, "Exhibit C for Plaintiff" (R., 51), he stated "it may be well that the court and jury understand that this article is not counted on in the libel; it simply goes to the malicious intent" (R., 52). He offered and the court admitted in evidence, over the objection of defendant, certified copies from the records of the Executive Council indicating the action taken by that body with respect to the averments contained in the bill of complaint in the case of Arpin *vs.* Porto Rico Power and Light Company (R., 65, 68), and testified that he "was removed from office by cable received Thanksgiving Day morning, 1906"; he also narrated the circumstances surrounding and his connection as attorney with the suit of Francisco Antongiorgi *vs.* Gandia and Others, and stated his belief that the pending libel arose from that action (R., 68); that the criticisms contained in the articles complained of were "humiliating in the highest degree, not only that such charges should be made, but that such weight should apparently be given them by persons who did not know me (him) very well and should regard the source of those charges as a disinterested and responsible source"; such criticisms "resulted in the loss of friendships to a certain extent and to misapprehensions on the part of former acquaintances"; and resulted in his "practically refusing (or) at

least feeling indisposed to go any place where I (he) was likely to meet people whom I (he) had reason to believe assigned any importance or gave any weight to these charges, thereby depriving me (him) of the social life, formerly so pleasant" (R., 70).

Plaintiff did not, however, introduce any evidence tending to prove special damage with the exception of that which might be supposed to be incident to his loss of office.

Over the objection and exception of defendant, plaintiff was permitted to testify "as to the right of a United States attorney or a prosecuting attorney to practise in the United States his profession in private matters" (R., 72-74).

On behalf of plaintiff, Jose R. F. Savage, the then United States Attorney for Porto Rico, testified that he had "consulted the Attorney General of the United States about practising in cases in which the United States is not a party" and had been advised that that "official saw no objection to me (his) practising in any cases where the United States, the people of Porto Rico or the municipalities were not a party."

Defendant admitted his connection with "La Correspondencia" since 1902 or 1903 and his authorship of the articles in question, denied any personal acquaintanceship with the plaintiff, and tes-

tified that his attention was primarily called to him by the filing of the Antongiorgi suit, when he learned for the first time that plaintiff, as the prosecuting attorney of the Federal court, was practising his profession in a manner "considered illegal" by the laws of his country (R., 105). He justified the publications complained of by evidence tending to prove the truth of the statements contained therein, which statements, in so far as matters of fact were concerned, plaintiff did not seek to controvert. Defendant added that in making the publications in question his "only intention was to serve public interests, the interests of my country, and the interests of the American Government" (R., 108), and offered in evidence certain correspondence between the Attorney General of the United States and plaintiff (R., 114-121).

The Charge to the Jury.

The evidence on both sides having been declared closed, the court, after first instructing the jury generally as to the peculiar situation of the District Court of the United States for Porto Rico under the national law, specifically instructed them, among other things, as follows:

"There is nothing in the law of the United States, express or implied—and in fact the custom has been to the contrary—that would prevent a District Attorney of the United States from engaging in the general practice of the law in the

State where his district is, whenever his employment does not conflict with his duties as District Attorney of the United States, and when it is not prevented by local rules of court or express local statute. So far as is known, Porto Rico is the only place in the nation having a district court of the United States where the local attorneys-general and district attorneys are not thus permitted to practise locally in the courts. Therefore you are instructed that it involved no moral turpitude and there was no legal wrong denounced by law, in the action of Judge Pettingill in practising law locally in the Island of Porto Rico at the times and in the manner in which the evidence tends to show, and he himself admits he did practise. The local legislature, of course, might pass a law if it desired to do so, that would prevent the United States Attorney from practising law in the insular courts, but it has no power to pass any law affecting his conduct in this court, and the local law which was and is on the statute books did not and does not apply to the District Attorney of the United States for this Island, because he was not and is not a 'fiscal' such as is referred to in the local law" (R., 126). * * * Judge Pettingill had a right under the law and subject to the possible approval or disapproval of the Attorney General or President of the United States to choose for himself as to whether or not he would take cases as a practising lawyer in Porto Rico, where the local government or the People of the Island was the prosecutor or the defendant.

"You are instructed, that while the law of Porto Rico provides that, when a public employé is libeled and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges; this means that he must prove that the acts which he

criticised and with reference to which he libeled a plaintiff, were wrong in law and not that they were wrong in the opinion of the person who commits the libel, or others, and whenever a person who has libeled another, justifies and attempts to prove the truth thereof in law, if he fails to do so that fact may be considered as aggravation of the damages that may be awarded by the jury (R., 127).

"* * * Although you may believe from the evidence in this cause that the plaintiff was removed by the Chief Executive of the Nation from his office as United States attorney for the District of Porto Rico, still that fact must cut no figure in your verdict one way or the other; nor can you when estimating any damage to which you may believe the plaintiff entitled, * * * take into consideration the question of his removal from office at all for any purpose, nor can you take into consideration his loss of salary because of such removal, as an element in estimating his damages. * * *

"Liberty of speech and of the press has ever been highly prized by the American people, and the fathers who framed the Constitution provided strictly against the infringement or curtailing of these great human rights. Under our system of government, and such is almost the language of nearly all of the State constitutions, every person shall be at liberty to write or speak freely on any subject, but it is always provided that such speaker or writer shall be strictly responsible for any abuse of these great privileges. In other words, liberty of the press can never be permitted to degenerate into license of the press, and a publisher of a newspaper has no more right to libel an individual than has any other person. * * *

"But you are instructed, that in this case, the

publication by the defendant Manuel Zeno Gandia in La Correspondencia of the several articles that have been read to you, regarding plaintiff Pettingill, when taken as a whole, have been held by this court to be and you are instructed that they are what is known in law as libelous *per se,* that is (that) they contain language with reference to the plaintiff that affects him in his office as United States attorney, in such a manner as that the person libeled has a cause of action against the person who made the publication and malice in the writer is presumed in law (R., 127-8). Therefore, in any event, you must find for the plaintiff upon that issue and give him such damages as you may believe from all the facts and circumstances in the case he is entitled to. * * * In addition to this there is another element of damage known as punitive damages or smart money which it is the duty of juries in libel cases to add to the ordinary damages of the cause, and these damages it is the duty of the jury to give when they believe from a preponderance of the evidence that the person who committed the libel did it maliciously and without any good motive for the public good but with direct intent to injure the person against whom the libel is directed. Therefore, if you believe from a preponderance of the evidence in this case that when the defendant Gandia published these articles that are *per se* libelous against the plaintiff, it was done with intent to injure the plaintiff specially and not with any desire to do public good or to properly comment upon his actions as a public officer, then it is your duty to add to the other damages and you are bound to give him such punitive damages as under all the facts or circumstances in this case and these instructions you believe him to be entitled to. This may be any sum as you in reason. under all the

facts and circumstances, think ought to be imposed upon the defendant for his malice in publishing the libel referred to. The law obliges juries to add this 'smart money' damage in such cases. Not that the plaintiff is entitled to it inherently but as a deterrent to others in committing a like offense. * * *

"If, on the other hand, you should believe from a preponderance of the evidence that the defendant Gandia when publishing these *per se* libelous articles against the plaintiff was actuated by worthy motives and in good faith believed that he was endeavoring to correct a wrong which he in good faith believed existed, and which ought to be corrected, for the public good, then this being in good faith, will prevent you from granting punitive damages and the plaintiff will be entitled to recover only the regular damages which plaintiff Pettingill suffered as hereinbefore defined to you" (R., 129).

On behalf of the defendant Gandia the court was requested to instruct the jury, among other things, as follows:

"5. The jury are instructed that if they believe that defendant has established by a preponderance of evidence herein the truth of the matters contained in the articles contained in the 'Correspondencia' then they must find for the defendant on the main complaint.

"6. In this case the articles in the "Correspondencia' were directed against the plaintiff in his official capacity and hence the jury are instructed that the truth is a defense, and if defendant has established said truth he is entitled to a verdict on the main case.

"7. The official acts of plaintiff, Mr. N. B. K. Pettingill, were subject to reasonable criticism on the part of the defendant, Manual Zeno Gandia, and hence if the defendant went no further than that in said articles, then such criticism cannot be shown to indicate malice on the part of the defendant.

"The jury are instructed that in judging of the intent of the defendant, Manuel Zeno Gandia, in publishing said articles in the 'Correspondencia' (they) may take into consideration the local laws and customs in Porto Rico at and prior to the American intervention and since, governing other prosecuting officers in Porto Rico, and can take into consideration the training of defendant and the public sentiment of Porto Rico in the matter of prosecuting officers practising in other cases and taking cases against the government of Porto Rico."

Each of the foregoing requests for instructions on behalf of defendant was refused by the court upon the ground that either substantially or in another form they had each already been given, "or because the facts and the law do not warrant the giving of them, as the case may be," and to the ruling of the court in refusing the same, counsel for the defendant duly excepted of record while the jury remained in the box at bar (R., 133).

Counsel for defendant thereupon proceeded to state at length objections to various portions of the court's charge given to the jury, to which course the court objected, advising counsel that he might state such "further objections to the

stenographer" * * * "after the jury goes." To the procedure thus indicated, counsel for defendant further objected and requested the notation of an exception to the refusal of the trial judge to permit the exceptions in question to be taken. This request was refused (R., 134).

> "Mr. HORD: Will your honor allow me an exception to the fact that you would not let me take them before the jury retired?
> "The COURT: No; I won't let that go in the record because it is not a fact. I won't let anything go in the record that shows that you did not get them while the jury is here because you did get them."

Thereupon, the jury having withdrawn, counsel for defendant noted the following exceptions to the indicated portions of the court's charge:

* * * * * * *

> "2. That it is the custom in the United States for district attorneys to practice.
> "3. That there was no legal wrong or moral turpitude in Judge Pettingill practising law in this court.
> "4. That Judge Pettingill had a right to take cases in which the People of Porto Rico were prosecuting.
> "5. That the justification to be shown by the defendant must be true in law, thereby limiting the scope.
> "6. To the charge that the publication in La Correspondencia was libelous *per se*.
> "7. That in any event the jury must find for the plaintiff Pettingill on this complaint in some amount."

Presumably with reference to the provisions of section 212 (chapter V, Exceptions) of the Laws and Code Civil Procedure, Porto Rico, 1904, which declares that—

> "when an exception is taken, the court, judge, tribunal, or judicial officer shall allow sufficient time for the reduction to writing and settlement of the same, and in case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit, and the party taking such exception may apply to the court or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so settled, the same shall become a part of the record in such action or proceeding."

counsel for defendant Gandia filed in the cause affidavits explaining the last above-mentioned occurrence in greater detail, which affidavits were included in the bill of exceptions (R., 135, 136) and, together with the court's own statement of the occurrence in the form of a Journal Entry, have been made a part of the record in the cause (R., 137).

From the affidavits it appears that "before the jury had left the box" counsel for defendant (Mr. Hord) undertook to note exceptions to certain parts of the court's charge, but before being able to state such objections the trial judge refused to allow him to proceed therewith, whereupon Mr.

Hord endeavored to note an exception to this action of the court, but the court refused to allow such exception to be noted, all of which occurred while the jury was still in the room (R., 135).

Counsel for defendant persisted "in a low voice" in asking the permission of the court to continue stating his exceptions, saying "that it was his opinion that the decisions of the Supreme Court of the United States indicated that all such exceptions to the instructions of the judge to the jury should be made and noted before the jury leaves the box," whereupon the learned trial judge refused to allow such exceptions to be noted in the presence of the jury and refused to allow an exception to his ruling in such regard to be noted, "stating that he did not agree with the Supreme Court, and that various attorneys of his court had already requested him to allow such instructions about ten times and he was sick and tired of it and would make an example of the next one making this request and would commit him"; thereafter, the jury having completely retired from the room, "the court allowed Mr. Henry F. Hord to note his exceptions to the instructions to the jury" (R., 136).

The learned trial judge not admitting that the stenographer's report and said affidavits set forth "the exact occurrences that took place," included in the bill of exceptions the court's own record as entered in the journal of the court, stating "that

the same is true and correct in all respects" (R., 137).

The court's record of the occurrence, in essential part, is as follows:

At the end of the court's instructions counsel for the defendant and cross-complainant (Mr. Hord)—

> "asks leave to object and except to certain of the court's instructions as thus given, which leave is then and there granted, and said counsel proceeds to state his objections at length in the presence of the court and the jury, to the stenographer. Whereupon after said counsel has stated one or two of said objections, the court informs him that it has made up its mind that it will not instruct the jury in any other manner than as already instructed, and that his objections in that behalf are, and will be, overruled, but that the counsel may state them to the stenographer as a part of the record, but that the jury must be permitted to retire in the meantime, to which action of the court said counsel then and there objects and requests that the jury be kept until he has stated all of his objections to the stenographer at length as he is doing, and the court denies this request and orders that the marshal take the jury to its quarters for deliberation, which is then and there done, and as they are leaving the court-room said counsel requests leave to continue the stating of all of his objections to the instructions to the stenographer, which request is granted, and he then and there finished the

> stating of the same, to which action of the court in refusing to permit counsel to state all of his objections at length in the presence and hearing of the court and jury, to the stenographer, as aforesaid before the jury retired, said counsel for defendant and cross-complainant then and there duly objects and excepts."

The jury having returned its verdict in favor of the plaintiff assessing his damages at the sum of $8,000.00 (R., 26), final judgment in favor of the plaintiff and against the defendant, based on said verdict, with an added attorney's fee and costs of suit, was duly entered (R., 27).

To review the course of the proceedings in the court below and to reverse this judgment for errors of law appearing in the record, the defendant Gandia sued out the writ of error herein and stayed the effect of the judgment of the lower court by giving an approved *supersedeas* bond in the penal sum of $12,000.00 (R., 40, 41).

ASSIGNMENT OF ERROR.

It was error in law on the part of the trial judge to refuse to permit counsel for Gandia to state, while the jury was yet at the bar, his exceptions to such portions of the court's instructions to the jury as seemed to him to be objectionable either in matter of law or in matter of fact.

In *Phelps vs. Mayer*, 15 Howard, 160, Mr. Chief Justice Taney, delivering the opinion of the court, said:

(P. 161:)

> "It has been repeatedly decided, by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster 2d, which provides for the proceeding by exception requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge, who authenticates it, to have been so taken.
>
> "Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that

one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time.

"The subject was fully considered in the case of *Sheppard vs. Wilson*, 6 How., 275, where the cases previously decided in this court, affirming the rule above stated, are referred to."

In *United States vs. Breitling*, 20 Howard, 252, the same learned Chief Justice, considering the supposed effect of a certain State statute relating to bills of exceptions upon practice in the Federal circuit courts, said:

"* * * the statute of Alabama, and the regulation it prescribes to the courts of the State, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it. The attention of this court has, upon several occasions, been called to this subject, and the rule established by its decisions will be found to be this: The exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. This point was directly decided in the case of Phelps *vs.* Mayer, 15 How., 260; and again, in Turner *vs.* Yates, 16 How., 28. And the time within

> which it may be drawn out and presented to the court, must depend on its rules and practice, and on its own judicial discretion."

To like effect are

Dredge *vs.* Forsyth, 2 Black, 563, 568.

Bram *vs.* United States, 168 U. S., 532, 571, and cases cited therein.

The rule has been frequently reiterated and followed in the inferior Federal courts.

Stone *vs.* United States, 64 Fed. Rep., 667, 677.

Little Rock Granite Co. *vs.* Dallas Co., 66 Fed. Rep., 522, 523.

Johnson *vs.* Garber, 73 Fed. Rep., 523, citing many authorities.

Merchants' Exch. Bank *vs.* McGraw, 76 Fed. Rep., 930, 935.

New England, &c., Co. *vs.* Cathicolicon Co., 79 Fed. Rep., 294, 295.

Western Union Tel. Co. *vs.* Baker, 85 Fed. Rep., 690.

Greene *vs.* United States, 154 Fed. Rep., 401, 412.

In Merchants' Exchange Bank *vs.* M'Graw, 76 Fed. Rep., 930, Hawley, J., delivering the opinion of the court, said (p. 935):

> "It is argued that these portions of the charge were calculated to and did mislead

the jury from the real and only questions of fact as to the intention of the parties. It is, however, contended by the defendant in error that this court cannot review the charge of the lower court in this respect, because the record affirmatively shows that no exceptions were taken to the charge of the court, or to the refusal of the court to give instructions asked by plaintff, until after the jury had retired to deliberate upon their verdict. This contention must be sustained. The national courts have uniformly and repeatedly declared that, in order to be of any avail, the exceptions to the charge of the court, and to other instructions given or refused, or any other rulings of the court, must be taken before the jury retires to deliberate upon their verdict. * * * (Citing numerous cases.) A strict enforcement of this rule is absolutely essential to the proper and intelligent administration of justice. It often serves to correct inaccurate, inadvertent, or misleading expressions in the charge of the court. It affords an opportunity for explanations and qualifications which might otherwise be overlooked. It is not merely formal or technical. It was introduced, and should be adhered to, for purposes of justice. The exceptions, when taken, should be specific and direct, so as to call the attention of the court to the particular point which is claimed to be erroneous. The practice of allowing counsel to take exceptions to the charge, or instructions, after the jury has retired, except in cases where the charge complained of was given in the absence of counsel, should be discontinued, because the allow-

> ance thereof simply incumbers the record, and creates unnecessary expense in the printing of the record and briefs of counsel upon points that will not be considered by the appellate court. The proper practice is to inform counsel that, if they desire to take any exceptions to the charge, it must be done before the jury retires It is not necessary that a bill of exceptions should be formally drawn up and signed. It will always be sufficient if the exceptions be taken and noted at the time with sufficient certainty, and may afterwards, during the time allowed by the rules, or within such time as the court may allow, be reduced to form and signed by the judge."

In the case of Commercial Travelers' Mutual Accident Association of America *vs.* Fulton, 79 Fed. Rep., 423, where suit was brought on an accident insurance policy, Lacombe, J., said (p. 424):

> "Before proceeding to discuss the points which are raised by exceptions of the plaintiff in error seasonably taken, it seems appropriate to call attention to a point of practice. Eleven of the exceptions to the charge of the judge, which have been assigned as error, and to which argument has been addressed in the brief, were not taken, as the record shows, until after the jury had retired in charge of a sworn bailiff. This practice has been expressly condemned by the Supreme Court in Hickory *vs.* U. S., 151 U. S., 316; 14 Sup. Ct., 324, and by this court (Park Bros. & Co. *vs.* Bushnell, 9 C. C. A., 140; 60 Fed., 583), for reasons which

may be found therein set forth. If, as plaintiff in error suggested on the oral argument, this was by the express direction of the trial judge, who thus deprived plaintiff in error of the opportunity to take its exceptions at the proper time, that fact should have been set forth in the record, and we might afford proper relief. But, in the absence of anything to indicate such a departure from the well-settled practice, we must assume that this case is in that respect on all fours with Park Bros. *vs.* Bushnell, *supra,* and dispose of these 11 exceptions in the manner indicated in that case. Fortunately for plaintiff in error, the exceptions which were properly reserved sufficiently present the points it has argued in this court."

In Dalton *vs.* Moore, 141 Fed., 311, 314-15, it was objected by defendant in error that plaintiff in error could not rely upon certain exceptions which were made after the jury retired, the judge declining to detain the jury during the taking of the exceptions on the ground that there were but two hours of the term left for the jury to render its verdict, and the court feared the verdict would not be rendered within that two hours if the exceptions were heard before they retired. The defendants in error cited the Western Union case, *supra.* Morrow, J., delivering the opinion of the court, said:

"The instructions to the jury were given near the close of the term, and it appears

to have been the opinion of the court that the case should be concluded before the end of the term at midnight, in order that the regularity of the proceedings should be preserved. To accomplish this purpose, the court, before the case was closed, permitted counsel to take his exceptions afterwards that the jury might take the case without delay. The questions involved in the instructions were well understood by court and counsel, and there was no misunderstanding as to the instructions that were given and refused, or the exceptions that counsel desired to take thereto. We think the plaintiffs in error cannot be deprived of their exceptions to the charge to the jury by the action of the court. Ah Lep *vs.* Gong Choy, 13 Oregon, 211."

In Berwind-White Coal Mining Co. *vs.* Firment, 170 Red. Rep., 151, 153, it was said:

"Defendant assigns as error many statements in the charge and in refusals to charge, all covered by exceptions. It appears from the record that all these exceptions were reserved after the jury had withdrawn in custody of the bailiff. It is certainly surprising that in view of the opinions of this court in Park Brothers *vs.* Bushnell, 60 Fed., 583; 9 C. C. A., 140, and Commercial Travelers' Accident Co. *vs.* Fulton, 79 Fed., 423; 24 C. C. A., 654, such a practice should still be followed in this circuit. In the case at bar defendant itself suggested it. As we pointed out in the case last above cited, if this course had been followed by express direction of the trial

judge, defendant could have excepted to a ruling which deprived him of the opportunity to take his exception at the proper time and thus reserved his rights, but he did not do so, and these belated exceptions will not be considered."

Mann *vs.* Dempster, 179 Fed. Rep., 837 (pp. 838-9), seems to be particularly applicable to the case at bar.

"LACOMBE, *Circuit Judge:* The action was for libel. At the close of the testimony the trial judge asked if there were any requests to charge. Both sides replied that they had no requests to hand up. Thereupon the court charged the jury quite fully. At the close of the charge defendant's counsel said, 'If the court please, I desire to except——' when the court interrupted him, saying, 'You will note your exceptions to the charge to the stenographer; it is not necessary for the jury to wait.' Thereupon, as the record shows, the jury retired and the judge retired. Defendant's counsel then dictated to the stenographer three exceptions to three different parts of the charge.

* * * * * * *

"This court also has repeatedly held that exceptions to the charge taken after the jury has retired are improperly reserved and cannot be considered here. Park Bros. *vs.* Bushnell, 9 C. C. A., 140; 60 Fed., 583; Commercial Travelers' Accident Co. *vs.* Fulton, 79 Fed., 423; 24 C. C. A., 654; Berwind-White Coal Co. *vs.* Firment, 170 Fed., 151; 95 C. C. A., 1. See, also, opinion of

Circuit Court of Appeals, Ninth Circuit, in Western Union Tel. Co. *vs.* Baker, 85 Fed., 690; 29 C. C. A., 392, and cases therein cited. The error assigned was so manifest that, when attention was called to it on the oral argument, it seemed to the majority of the court that but one disposition could be made of the appeal, whereupon argument on the merits was not heard, and the cause was taken for decision, with an intimation that the judgment would probably be reversed.

"In the Firment case, however (170 Fed., 151; 95 C. C. A., 1), after calling attention to the circumstance that the improper practice was suggested by the defendant (appellant), we said:

" 'If this course had been followed by express direction of the trial judge, defendant could have excepted to a ruling which deprived him of the opportunity to take his exceptions at the proper time, and thus reserved his rights; but he did not do so, and these belated exceptions will not be considered.'

"In the case now at bar, counsel for the defendant (appellant) did not himself suggest the course pursued, but he apparently acquiesced in it without protest and dictated his exceptions to the stenographer. Had he taken an exception, when the court instructed the jury to retire, on the ground that their doing so would prevent his reserving exceptions to the charge, which an appellate court could consider and refused to take exceptions in the presence merely of the stenographer there would have to be a reversal because under the authorities the appellate court has no discretion to con-

sider belated exceptions, and a refusal to allow exceptions to be taken in time is manifest error. But as the case stands it is substantially the same as Berwind-White Coal Co. *vs.* Firment, *supra*, and we must dispose of it solely on the exceptions which were lawfully reserved."

In the present case the learned trial judge not only ordered counsel in the presence of the jury to state his objections "to the stenographer as a part of the record" *after* the jury had retired (R., 133, 138), at the same time informing him that his objections, yet unspoken, "are and will be overruled," but he also specifically denied counsel's request "that the jury be kept until he has stated all of his objections to the stenographer at length as he is doing," and ordered the marshal to "take the jury to its quarters for deliberation" (R., 138), incidentally remarking that "he did not agree with the Supreme Court" in the particular under discussion; that other attorneys of this court had theretofore made similar request with respect to the taking of exceptions; that "he was sick and tired of it, and would make an example of the next one making this request and would commit him," after which the jury retired (R., 136), leaving counsel to state his exceptions to the court's charge, to the court and the official stenographer.

Fortunately, for the purposes of this case, counsel for the plaintiff in error here, after having been

denied his plain legal right "to state all of his objections at length in the presence and hearing of the court and the jury, before the jury retires," "duly objects and excepts" to such ruling of the court (R., 138).

Both upon plain principles of right, practice, and upon the strength of the authorities above cited, the judgment here complained of, for the reason above stated, should be reversed and the cause remanded for further proceedings.

If, however, this honorable court should think that the judgment should not be reversed on this point of practice alone, then as a judge ought to act conformably to law and not according to discretion, and as no man should be made to suffer either in his person or estate by the willful wrongdoing of a judge, we, counting upon exceptions taken below, both in the course of the evidence, and also to portions of the charge of the court taken in the absence of the jury as directed by the trial judge, and also upon the exceptions taken in the presence of the jury to the refusal of the court to grant certain requests for instructions to the jury (R., 133, 134), further rely for such reversal upon the following

ADDITIONAL ASSIGNMENTS OF ERROR.

1. Error in refusing to instruct the jury that if they believed from the evidence that the defendant had established the truth of the matter stated in the published articles complained of, then they should find for defendant (R., 133).

2. Error in refusing to instruct the jury that as the published articles complained of were directed against the doings of plaintiff in his official capacity, the establishment by proof of the truth of the statements therein contained would constitute a good defense to the action, and if they found from the evidence that defendant had established the truth thereof, their verdict should be for the defendant (R., 133).

3. Error in refusing to instruct the jury that the acts done by plaintiff, under the circumstances, were subject to reasonable criticism on the part of defendant, and if the jury should find from the evidence that defendant in the articles complained of went no further than that, then such articles and the criticisms therein contained did not tend to prove malice on defendant's part (R., 133).

4. Error in refusing to instruct the jury that in judging of the intentions of defendant in publishing the articles in "La Correspondencia" they

should take into consideration the local laws and customs in Porto Rico at and prior to the American intervention and since, governing other prosecuting officers in Porto Rico, and also the training of defendant and the public sentiment in Porto Rico in the matter of prosecuting officers practicing in and taking cases against the Government of Porto Rico (R., 133, 71, 101).

5. Error in admitting evidence as to the right and custom of United States or prosecuting attorneys in the United States to engage in private practice (R., 72), and particularly as to the fact that the United States District Attorney for the District of Columbia, "not only practiced privately, but practiced in cases in which the interests of the District of Columbia are directly involved on the other side" (R., 73), and in charging the jury that it was customary in the United States for district attorneys to so engage in private practice not in conflict with his official duties (R., 126).

6. Error in charging the jury that "it involved no moral turpitude and there was no legal wrong denounced by law in the action of Judge Pettingill in practicing law locally in the Island of Porto Rico at the times and in the manner in which the evidence tends to show, and he himself admits he did practice" (R., 126).

7. Error in charging the jury that the local law of Porto Rico "did not and does not apply to the District Attorney of the United States" for said Island, because he is not a "Fiscal" such as is referred to in the local law (R., 126, 134).

8. Error in charging the jury "that while the law of Porto Rico provides that, when a public employee is libeled and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges; this means that he must prove the acts which he criticised and with reference to which he libeled a plaintiff, were wrong in law * * * and whenever a person who has libeled another, justifies and attempts to prove the truth thereof in law, if he fails to do so, that fact may be considered as aggravation of the damages that may be awarded by the jury (R., 127, 134).

9. Error in charging the jury that the publication by defendant of the articles complained of by plaintiff, "taken as a whole," "are what is known in law as libelous *per se;*" that malice on the part of the author is presumed, and the jury must find "in any event" for the plaintiff upon that issue and give him such damages as they may believe from all the facts and circumstances in the case he is entitled to," at the same time and in the same connection further charging that under certain circumstances it is the duty of juries in libel cases

to add to the ordinary damages punitive damages or smart money, which in the present case might be such sum as the jury "think ought to be imposed upon the defendant for his malice in publishing the libel referred to" (R., 134).

ARGUMENT.

As pertinently observed in the course of the opinion of this court (per Mr. Justice Day) in Perez *vs.* Fernandez (Fernandez *vs.* Perez), 202 U. S., 80, 91:

> "The case affords a striking illustration of the difficulty of undertaking to establish a common-law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a State following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a common-law State.
>
> "Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enact-

ments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. Kepner *vs.* United States, 195 U. S., 100, 122. This policy has been followed in dealing with the Porto Ricans. President's Message, December 5, 1899; Walton's Civil Law in Spain and Spanish America, 594. The new civil government was established by the act of April 12, 1900, commonly known as the Foraker Act, 31 Stat., 77. Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States." * * *

(P. 96:)

"This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker Act established a United States District Court

for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and provides that it shall proceed therein in the same manner as a circuit court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both district and circuit courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: 'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' The act of August 13, 1888, 25 Stat., 433, provides that the circuit courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the district court exercising the jurisdiction of a circuit court, in analogy to the powers of the circuit courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by

Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law."

(P. 98):

"It is further objected that the United States court has no method by which it can assess these damages in the manner required in the Porto Rican Code. In giving the remedies provided therein and assessing the damages we see no reason why that court cannot adapt itself to the requirements of the local code and administer the remedies therein provided. In Traction Company *vs.* Mining Company, 196 U. S., 239, it was held that the Federal court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the ends of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a circuit court of the United States administered in such courts it was held: 'In the exercise of that power a circuit court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right, secured by the Constitution and the laws of the United

> States.' In view of the provisions of the Foraker Act, continuing local laws in force, this reasoning has application to the powers of the United States court in that Territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican Code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that code. The procedure is simple and easily administered."

In that case it appeared that at no time prior to the institution of the suit had any attempt been made by the local legislature to alter the state of the local law as it had existed prior to the American occupation with reference to actions for and assessment of damages incident to the wrongful suing out of an attachment.

But in the case at bar, subsequent to such occupation, namely, in 1902 and prior to the institution of these proceedings, the Porto Rican legislature by statutory enactment had "established" the civil action to recover damages for libel and slander and had carefully defined each of such offenses, had established certain rules for the guidance of the courts in the administration of such actions, and had declared in precise phrase when the existence of malice might or might not be presumed, and had provided that—

> "SECTION VI. If the plaintiff be a public employee and the libel refers to acts connected with his office, judgment shall be

rendered for the defendant if he prove the truth of his charges."

Under the American law, as generally admin-
tered in the Federal courts of the United States,
bel has been defined to be any "publication,
ther by writing, printing or pictures which
harges upon, or imputes to any person that which
nders him liable to be punished, or which is cal-
ulated to make him infamous or odious, or
diculous.

Under the Porto Rican law libel is defined to
—

"The malicious defamation of a person made public by writing, printing, sign, picture, representation, effigy, or other mechanical mode of publication tending to subject him to public hatred or contempt, or to deprive him of the benefit of public confidence and social intercourse, or to injure him in his business, or in any other way to throw discredit, contempt or dishonor upon him."

Under the generally established American law
every instance of slander, either verbal or writ-
g, malice is an essential ingredient, and when-
er substantially averred and the language, either
ritten or spoken, is proved as laid, its existence
ill be inferred by the law until, in the event of
nial, the proofs be overthrown or the language
self be satisfactorily explained.

Under the Porto Rican law publications or communications of certain specified classes (see sec. 4) are expressly excluded from any presumption or inference of malice—an exception to the law of inference being (see sec. 5) cases of injurious communications or writings "made without justifiable motive and addressed to persons other than to a relative within the third degree or other persons specifically identified."

Under the American law words prejudicial in a pecuniary sense, *e. g.*, implying unfitness of a person in office, or improper conduct on his part in connection therewith, are said to be actionable *per se*, whereas, under the Porto Rican law (see sec. 6), if the plaintiff be a public employee and the alleged libel refers to acts connected with the conduct of his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

Under the American law, in a criminal prosecution for libel, the truth of the charges made constitutes no defense,

White *vs.* Nichols, 3 Howard, 266;
Dorr *vs.* United States, 195 U. S., 138;

although it is otherwise in the civil action to recover damages for libel.

Under the Porto Rican law the truth of the matters, written or spoken of any public employee, is

a complete defense to an action of libel and would equally seem to constitute a defense in the case of private individuals in the absence of evidence tending to show that the publication had been "made without justifiable motive."

The case at bar was tried by the court, apparently with the common consent of both parties, upon the theory that the statements made by the defendant and published in the various articles complained of were made of and concerning plaintiff in connection with his office as United States Attorney for Porto Rico.

At no time did the plaintiff either deny or seek to disprove the truth in matter of fact of any of the statements contained in said publications; on the contrary, he expressly admitted the truth thereof (R., 108). His contention seems to have been that although local or Porto Rican prosecuting officers, while occupying such official position, were admittedly prohibited from engaging in the practice of the law generally, no such prohibition applied to him as prosecuting officer of the United States attached to the United States District Court for Porto Rico; that therefore the statements contained in said publications imputing immoral and illegal conduct on his part for so engaging in private practice, and particularly in cases adverse to the People of Porto Rico, while at the same time occupying his high Federal office, gave rise to a cause of action, and entitled him to recover dam-

ages and "smart money" from any unlucky wight whose provincial susceptibilities may have been shocked by such course of conduct if only he dared express his honest thought on the subject.

In this connection it is to be borne in mind that the Porto Rican act of March 9, 1905 (Laws of Porto Rico, 1905-1906, p. 123), expressly declares:

> "SEC. 1. That the fiscal of the Supreme Court, *District Attorneys* and municipal judges are hereby prohibited from engaging in the practice of the law;"

It would seem to afford small cause for wonder, in view of the pronounced prejudices of the Porto Rican people against prosecuting attorneys engaging at one and the same time in official and private practice, a rule of conduct which had been a cardinal principle of the ancient Spanish law in force in the colonies and had been reiterated by the independent Porto Rican legislature after the island had passed under the control and domination of the United States, that the Attorney General of the United States should have been so little impressed with the carefully constructed justification of a contrary course of conduct contained in defendant in error's letter under date of November 9, 1906, to that official (R., 115, *et seq.*).

It would seem to be plain, from all of the foregoing, taken together, that the learned trial judge, in the administration of this cause did not confine himself to the administration of or feel himself

bound by the provisions of the local law of Porto Rico, which local law, under the statutes of the United States as interpreted in the case of *Perez vs. Fernandez, supra,* he was bound to consider to the exclusion of all others.

As the foregoing suggestions apply with more or less directness to each and all of the "Additional Assignments of Error," it would seem to be unnecessary to repeat the same in varying form with respect to each and every of such "assignments."

Upon the whole, it is respectfully submitted that the judgment of the District Court of the United States for Porto Rico should be reversed and the cause remanded to that court for further proceedings in accordance with law.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 87.

MANUEL RENO GARDIZA, PLAINTIFF IN ERROR,

vs.

F. & M. PETTINGILL, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

[illegible]
GEORGE H. LAMAR,
Attorneys for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 97.

MANUEL ZENO GANDIA, PLAINTIFF IN ERROR,

vs.

N. B. K. PETTINGILL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This was an action brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) for $50,000 damages for libel by the publication in a newspaper belonging to him of a series of articles reflecting injuriously upon the character and conduct of plaintiff in his profession of attorney at law and in his official position as United States attorney. The trial resulted in a verdict and judgment against defendant for $8,000.

In support of his writ to have that judgment reversed defendant assigns thirty-three errors, which will be considered

in order, grouping them together for joint discussion so far as their subject-matter permits. But as a preliminary step, in order to make clear the motive behind this series of articles and to bring out their full significance, as it was made to appear before the jury which rendered the verdict, we propose to set out a concise history of antecedent and contemporary events appearing from the record, including the text in translation of the articles themselves.

The plaintiff is an attorney at law who was first admitted to practice at the bar of Suffolk County, Mass., in 1888, and continued in active practice ever since that time except for the year that he sat on the bench as hereinafter stated. He had practiced in Florida ten years, and had been admitted to the bar of this Supreme Court in 1897, thereafter removing to reside and practice in Porto Rico in 1899. In July of that year he was appointed judge of the United States Provisional Court for Porto Rico, and so remained until that court was abolished by the act of Congress of April 12, 1900, establishing civil government in that island. Under that act he was appointed in June, 1900, United States attorney for Porto Rico, was reappointed in 1904, and in 1906, at the time of the libel, still held that office and had also acquired a considerable private practice.

The defendant was and had been for several years prior to the publications complained of the owner and editor of a daily newspaper, published in Spanish, in the city of San Juan, called "La Correspondencia," and had never, previous to the first of the articles complained of, criticized the actions or conduct of plaintiff in any way. In fact until the occurrences hereinafter related a few months prior to said publication plaintiff and defendant were unknown to each other, even by sight.

In January, 1906, the plaintiff, as counsel for one Francisco Antongiorgi, who was the brother of the wife of defendant, had prepared and filed a bill in chancery in the Federal court of Porto Rico against the three sisters of An-

tongiorgi and their husbands, alleging that he was the victim of a conspiracy to defraud him of his inheritance from his mother (who had died in November, 1905) by the production of a forged document as her genuine and valid last will and testament, and that defendant had been the principal conspirator therein. Upon the allegations of this bill of complaint, a receiver had been appointed by said Federal court, who had taken possession and control of all the property forming the estate of said deceased mother, and still so held possession at the time of the publication of said series of articles against plaintiff. These articles, with the respective dates of their publication, as translated into English in the bill of exceptions, were as follows:

"(April 26, 1906.)

"Immorality.

"The laws of Porto Rico prohibit a lawyer from being able at the same time to discharge the duties of a prosecuting attorney of a court and to exercise his profession. And why did such a law occur to our Legislature? For the reason that laws are inspired by principles of morality, and it is an immorality which was without doubt repugnant to Porto Rican legislators that a man should act as a lawyer before the same Tribunal where he holds the highest office after the Judge: the office of Prosecuting Attorney, who makes accusations against delinquents or against those who are beyond the pale of the law. Therefore in no court of Porto Rico is there a Porto Rican Prosecuting Attorney having the audacity to open an office as a lawyer. Here are in force the laws of Porto Rico, and all persons obey and respect those laws. But in the Federal court which the Government at Washington has established in the island things are not done in the same manner. Perchance what was repugnant to the Porto Rican legislators was not noticed by the legislators of other communities. In the Federal Court it is said the Prosecut-

ing Attorney may practice, and without doubt that right conceded to said official has neither exceptions nor limitations, because the Prosecuting Attorney of the Federal Court of Porto Rico has practiced his profession as a lawyer in all classes of business.

"The law says that the People of Porto Rico shall pay a salary of Four Thousand Dollars to the Prosecuting Attorney of that court, who is today the well known lawyer Mr. Pettingill. And the People of Porto Rico faithfully pay his salary to Mr. Pettingill. *The enemies of the People of Porto Rico, those who are pursuing it, those who are litigating against it, those who have suits against it, invite the lawyer Pettingill to associate himself with their hostility and to lead them in a controversy, more or less unjust, against Porto Rico. And Mr. Pettingill gladly agrees and brings suit against the People of Porto Rico for the collection of money or the establishment of some right. Shortly after the complaint is formulated, a voucher is filed away in the Department of the Auditor, and in that it appears that the People of Porto Rico has paid the very salary which it is obliged to pay to the same man who, leagued with others, threatens it, opposes it, and forces it into a suit, before taking part in which his salary ought to be returned.*

"It appears to us that that is not American. We know of no law in the United States which authorizes an inconsistency so irritating, calculated to stir up hatred more than a whip laid upon the back of a people. The Constitution of the United States establishes inconsistencies as outside of reason and of law. To force money from a man and then to aim at him the blow of inciting discord is an action not in accordance with American law, nor with Pan-American law, nor with any law in the world. It might be in accordance with immoralities consented to by those who consider that an abuse finally becomes law, if there are those who consent to it. But the Porto Ricans are not willing to consent any longer to that immoral audacity.

"It is necessary that Congress inform itself as to what class of men and what class of officials are here,

speaking in the name of the United States, and what class of machines are running in the Federal centers which that same government has established in the island, without doubt intending the welfare of the Porto Ricans, and without doubt intending that the public and private rights of the Porto Ricans should be respected. *The public opinion of the United States cannot, and ought not to, be deceived by causing the belief that puritanic scrupulosity prevails among us and that upright men dispense justice for us, while there exists in Porto Rico a Federal court in which an official performs his duties, who is called a Prosecuting Attorney, who prosecutes before the court and brings suits against the People; and while the obligation rests upon the People of Porto Rico to pay that monster of immorality and that abuse of the people's patience.*

"That Prosecuting Attorney ought to resign his position or that lawyer ought to close his office. Neither another's advice nor the order of the government ought to be the stimulus to bring him to this decision; his personal conception of justice ought to be sufficient for that. Neither the People of Porto Rico nor the officials of Porto Rico, whose duty it is to defend the interests of the island, one of which is called Public Morals, ought to consent that this machine should continue to run."

(April 28, 1906.)

An Outrage.

"A law prohibiting the Prosecuting Attorney of the Supreme Court, the Prosecuting Attorneys of the District Courts and Judges of the Municipal courts from practicing law is worded as follows:

" 'SECTION 1. That the prosecuting attorney of the Supreme Court, the prosecuting attorneys of the District Courts and Municipal Judges are hereby prohibited from engaging in the practice of law; but this law shall not prevent the prosecuting attorney of the Supreme Court nor the prosecuting attorneys of the District Courts from appearing as counsel in

representation of the People of Porto Rico or of any public functionary, as may be authorized by the laws now in force.'

"It is evident that the Legislature of Porto Rico considers it immoral that the Prosecuting Attorney of a court should exercise his profession as a lawyer before the same court of which he is a functionary. And it is also evident that the legislative power of the island is illegally opposed by the lawyer Mr. Pettingill who, claiming rights of which this country is ignorant, if indeed they exist, is exercising in a court created in Porto Rico by the Government of the United States two functions which are incompatible, that of Prosecuting Attorney and that of a lawyer practicing his profession before that court.

"We do not see that there could be any difference between the venerable President of the Supreme Court of Porto Rico and an American lawyer who at an unexpected moment presented himself to us with powers to us unknown for contesting the will of the People of Porto Rico, litigating in suits against that government and discussing legal principles with its representatives, while the Treasury of the Island pays him his salary.

"The Legislature of the Island went still further. Articles 25 and 26 of the Code of Civil Procedure read as follows:

" 'ARTICLE 25. No judge, or other judicial officer, shall have a partner acting as attorney or counsel in any court of this island.'

"And as if it were not sufficient to close the doors to immorality with respect to the prosecuting attorneys of the municipal courts, to the Judge of the Supreme Court and to the judges of the district courts, in still another law fixing salaries for the registrars of property the Legislature said:

" 'SECTION 9. The position of registrar of property shall be incompatible with all other positions or offices, whether such positions be elected by popular vote or not, and whether they be compensated or not; nor shall the registrar be allowed to practice his profession as lawyer.'

Porto Rican ethics diluted in the Porto Rican laws,

thus state. When lawyer Pettingill is permitted to be Prosecuting Attorney of a court and a lawyer before the same and partner of a firm of lawyers and a lawyer in suits against the People of Porto Rico, against which he is constantly working, it is without doubt because the ethics of Porto Rico are a kind of ethics solely understood in the West Indian archipelago. As we hold lawyer Pettingill in very high consideration as a man of lofty ideals because of his morality, intelligence and ability, we conclude that the island of Porto Rico does not understand ethics, true ethics, as the Prosecuting Attorney of the Federal Court understands them. It is possible to be a prosecuting attorney of a court in Porto Rico and to be an assaulter of the People of Porto Rico, injuring it by his allegations.

The Executive Council, according to the existing laws, forms a part of the legislative power of the island. Whatever may be the present condition of the laws in force in Porto Rico the Executive Council, as respects its origin, represents the President and the people of the United States and, as respects its legislative functions, represents the People of Porto Rico and the Executive of the island. Such representative functions and such ornaments of law have no signification whatever when the lawyer, Mr. Pettingill, prosecuting attorney of the Federal Court, needs to defend in a suit a client of his, overlooking the respect which is due the representatives of our people. Insults, reproaches and libels were made use of in the persecution of honest editors who utter the truth, cost what it may, and expose to the light things as they are.

"Hereby hangs a tale. A wild cascade leaps over the Falls of Comerio eliciting artistic admiration from some and interest from men of business. All the world knows the elaborate process through which the celebrated concession of Comerio Falls has passed. Recently a firm called 'The Porto Rico Power & Light Company' obtained it. Mr. Arpin, who claims certain rights against that concession, asks lawyer Pettingill to begin a suit in defense of what he considers his rights and against said firm. The Prosecuting

Attorney of the Federal Court agrees. That suit is proceeding and the Executive Council has been a mark for the attacks of the complainant. Although the Council is not the defendant, it was the grantor of the concession, and hence is brought into the suit, occupying the front of the stage.

"Now let us see the delicate pearls which the Prosecuting Attorney of the Federal Court of the island flings at the Council:

" 'Your orator represents that said advertisement, to which reference has been made, contains a further provision to the effect that said Executive Council not only reserved the right to reject any and all bids but also the right after opening the bids to treat and bargain with any bidder so as to secure a more desirable arrangement—which latter provision your orator alleges is not only unreasonable and unprecedented in any advertisement intended to invite fair and open public competition, but renders the invitation contained in such advertisement, and the proceedings carried on thereunder, farcical and useless, the favored bidder having full advantage of the bids of all others in the treating and bargaining which is to follow.

"Your orator avers that the course of action of said Executive Council, and the circumstances surrounding the same, and resulting therefrom, plainly show that the said provision was inserted in said advertisement in bad faith and for the specific purpose of allowing said Council to remain free from the obligation of accepting the lowest bid, if they accepted any, and free to ignore all other bids than that made by defendant Company, so that, whatever might be the other bids submitted, the bid of defendant might be preferred, and afterwards, under the system of treating and bargaining provided for, the concession might be granted to defendant upon such terms as might seem desirable.

"Your orator further represents that, notwithstanding the matters and things hereinbefore alleged, all of which your orator avers to be true, and of all of which the Executive Council was fully and repeatedly advised, said Executive Council received and

considered the said application or bid of said defendant Company on said 2nd day of December, 1905, against the protest of your orator as aforesaid, thereby ignoring and acting contrary to the express provisions of the laws and military orders governing such matters, and on the 4th day of January, 1906 unlawfully, arbitrarily and fraudulently granted the concession in question unconditionally to the defendant Company upon terms more favorable than said defendant had itself offered; and that by said grant said Executive Council also attempted to confer upon said defendant the right of eminent domain. And your orator avers that his application for said concession could be denied and that of defendant Company admitted and accepted, and the right of eminent domain could be pretended to be granted to said defendant, only by said Executive Council illegally and wrongfully claiming and exercising the power as a legislative power to make laws and regulations concerning the granting of franchises and concession wholly differing from, and inconsistent with, express provisions of existing law, which power your orator avers said Executive Council does not and has never legally possessed.'

"After the above and many equally endearing allegations the orator prays the court that the concession of the Council be annulled. We do not know whether the Council is aware how it is being treated and has in its dignity considered what it signifies to be accused of such acts and such evil methods. It is not known whether the Council considers itself inferior to a lawyer who insults it without proof and gives forth slander in place of logic. We are ignorant whether the Council knows at this moment what is the reputation which the Prosecuting Attorney of the Federal Court gives to its legislative and executive functions, in exchange for the dollars which his client may pay him and for the voucher which the Auditor files away each month.

"Of all that we are ignorant. And we are ignorant also whether the government of Porto Rico does not defend the People of Porto Rico from the abuses which are committed against it, and whether the

Executive Council, the author of the law against libel, thinks that this law is made for the Porto Rican common people and not against the Americans of influence, or if that Council submits itself to the abject part to which the invective of the Prosecuting Attorney of the Federal Court wishes to assign it, extinguishing in said Council the natural impulse of dignity which in one man alone or in several united is aroused when, like a whip which stings the face, an insult is hurled against them.

"Of the Executive Council five Porto Ricans form a part. Their acts in that Council are brought in question. That is not a dishonor, but doubts are cast upon them in that suit and they are discussed, as likewise the acts of their companions, the six Americans of the Council. It is necessary that the island should know if they bow their necks in resignation before the insinuations of the first pettifogger to whom it occurs to direct at them a few insults. And it is necessary also to know whether the full Council, in obedience to just laws, complying with the duties of their office, will take the necessary measures in order that the abuse may be restrained and that machine cease to run.

"If under the weight of such accusations they should submit, perchance the people might believe it true that the Council could act arbitrarily and fraudulently."

(June 7, 1906.)

A Scandal.

"'La Correspondencia' affirms categorically that there exists in the United States no law which authorizes the prosecuting attorneys of the courts to practice at the same time with their office the profession of law; and it affirms also that neither does there exist any law which prohibits such prosecuting attorneys from exercising such inconsistent functions. And 'La Correspondencia' affirms in addition, in a positive and energetic manner in order that the news may be spread to the most hidden corners of the

island, that, the North American judiciary being inspired by principles of rectitude, of morality, of equity, of good faith, and of self respect, there is not a single judicial official in any court of the United States who, while performing the duties of prosecuting attorney, has had the audacity to open an office as a lawyer, to become a member of a firm of lawyers, to go up and down hunting for clients, to stir up law suits, not only not against the People of the United States who assuredly would kick them out of their territory as traitors, but not even against the most poor and insignificant of the citizens of the United States.

"For a citizen of the United States to bring suit against the People of Porto Rico reflecting upon their governmental bodies, accusing them of having acted in bad faith and fraudulently, is a marvelous supposition. The constitution calls him a traitor who from a public office so far forgets himself as to sacrifice his country. If the citizen is the prosecuting attorney of a court, the case becomes one of inconceivable monstrosity. But even otherwise the prosecuting attorneys of the court of the United States would not consider it ethical or correct to exercise their profession in matters of private interest, because they know that within each prosecuting attorney exists always a man. If that man is honest, he will avoid the conflict which may possibly arise between lawyer and prosecuting attorney who live together one within the other; but if that man is wicked or an exploiter or a robber disposed to make money by any means, in that concrete case he, the prosecuting attorney, keeps silence in order that the lawyer may freely practice.

"For these and other reasons which we pass over in silence because it does not suit us to speak of everything at once, the honorable prosecuting attorneys of the American courts are not found subject to the just criticism which Prosecuting Attorney Pettingill of the Federal Court of Porto Rico has raised against himself by practicing a double profession and bringing suits against the People of Porto Rico where said court sits. The prosecuting attorney of a court of the United States upon taking possession of his

office takes an oath of fidelity to the laws and to the country, and when Prosecuting Attorney Pettingill took possession of his office in the island he ought to have taken a similar oath.

"Congress has created here a 'patria politica' which is inhabited by a people called The People of Porto Rico, and to it belong all who are not foreigners. Although we are convinced that Mr. Pettingill values his citizenship of Porto Rico at four hundred cartloads of whistles, he is inevitably a citizen of Porto Rico; and in such character he was and is bound by the oath of fidelity to the island of Porto Rico. As it would be very odd that either the lawyer or the prosecuting attorney Pettingill should deny this irresistible conclusion, we maintain that if said citizen contrives, defends, co-operates in, stirs up or aids in preparing suits against the People of Porto Rico and offends and insults its representatives, such prosecuting attorney, such lawyer and such citizen will fail in his duties; because, passing over his oath, he forgets that he cannot show want of respect for, nor insult, that power to which he has sworn fidelity and before which he ought respectfully to bow his head, giving it the highest place before the income from his lucrative practice. *Mr. Pettingill, whether as Prosecuting Attorney, as lawyer, or in both capacities, would not dare to do in the United States what he is here accomplishing with impunity. But it makes no difference that he may consider himself also exempt from punishment in Porto Rico. Let him desist from his error. The Porto Ricans will not consent to the abuse of their patience. If that man, prosecuting attorney and lawyer at the same time and before the same court, does not resolve the difficulty by his own act and does not put an end to the scandal which he is producing in the country, it will be necessary that the Porto Rican protest make known in Washington this new abuse which is being committed toward us.* Now let us pass to the facts.

(June 8, 1906.)

Facts.

"A short time since there took place in Porto Rico a *pitiful story*. That is what it was called by the 'Porto Rico Review,' a weekly publication which is edited in San Juan by ex-members of the Executive Council and ex-high officials of the government of the island. This story, which is somewhat long and complicated to be related in a moment, is that which refers to the scandal which a Mr. McKenna, Judge of the Federal Court, recently caused in the island on account of a cupidity which it is not worth while this very day at least to analyze.

"Quoting from the 'Porto Rico Review,' which was certainly well informed and entirely in accord with public opinion, although it passed over some details which are known; quoting, we say, from that periodical, we will say with respect to the matter that the judge to whom allusion is made 'desired to negotiate a loan through Mr. Valdés for $800. The matter had been in the mind of Judge McKenna for some time, and he had often spoken to Mr. Mott on the subject, and the attorney for Mr. Valdés and the friend of both. Mr. Mott states that he had put the matter off from time to time, offering various excuses, and that Mr. Valdés also instructed him to avoid the question, hoping that the judge would make some other arrangements and relieve him of his embarrassment. But at the noon hour, a week ago last Monday, Judge McKenna called Mr. Mott into his chambers and told him that the loan incident must be closed. Mott and Cornwell consulted. They could not, of course, recommend the loan to their client and then continue with the case. Upon the other hand, they were afraid, for obvious reasons, to refuse it. They called upon Judge Pettingill, U. S. Attorney, for advice. * * *

" 'The judge caused a note for the amount stated to be drawn payable to the clerk of the court, Mr. Scoville. Mr. Scoville delivered the note to Mr. Mott and received eight one hundred dollar bills from Mr.

Valdés, a check having been refused as a substitute for cash. The note was delivered to Judge Pettingill (prosecuting attorney).'

"Afterward, the whole world knows that the Bar Association of American lawyers, of which said Prosecuting Attorney Pettingill is the president, suggested to Judge McKenna the necessity of resigning and immediately leaving the island.

"But, perchance, does not this pitiful story, both for what it contains that is pitiful, and also in the facts of the story, comprise something more to clear up, subjecting it to public comment; something more to draw out from the gloomy depth in order to view it in the full light of criticism, subjecting it to the study of the impartial consciences of men of good judgment who know how to think logically? Of this pitiful story only the bark has been scratched. There is lacking that from the summary the characters may appear, not living the life of the official Gazette, or of that absurd conventionality, which hides or may hide the truth, but living the inner life, the real life, which palpitates between a credible purpose and an impulse actual and unquestionable.

"So is everything in life. So are all the pitiful stories. So is everything in the human farce, even to the point that the Nazarene had to enter into the temple and drive out with the lash the money-changers who invaded it.

"Since the 'Porto Rico Review' has not seen fit, as was its duty, to complete its work in this affair (that paper, which for a thousand reasons knows even intimately the characters), 'La Correspondencia' will try to give it that consideration, even though it may be superficial.

"Judge McKenna. The principal character. Perhaps a secondary character. A judge with a large salary who needs to ask from a litigant the sum of 800 dollars just before the time when he ought to decide a suit, or the incident in a suit, in which that litigant was interested. A man stricken in years, considered by some as too old. Evidence of the commission of acts which the law considers as crimes. Afterwards, his absence. In all probability he did

not see the President who appointed him to his office. He has been immured in Pittsburg, and it is unknown whether his acts have been investigated or whether a prosecution or investigation will be ordered by reason of them.

"Lawyer Mott. To him was made a dangerous proposition. The same judge suggested to him that he should ask from Mr. Valdés, a client of Mr. Mott and of Mr. Cornwell, a certain sum of money. Mr. Mott draws back from the equivocal proposition. He is afrand there may be danger in it as regards the rigor of the law or the rights of his client. But he is urged on anew. The judge again wheedles him and presses him. The business must be wound up by all means. Mott vacillates anew. He is stirred by conflicting influences. Mott acts uprightly, like an honest man. The strongest influences would favor his interest and he resists, does not decide, does not work boldly in favor of the loan. Then he consults Mr. Cornwell, the other lawyer of Mr. Valdés. And mark the dilemma! If they consent that the loan be made, the day of the judgment they would have to find themselves not only before the judge, but also before the suddenly-made debtor of their client.

"They understood that men of honor must be so under all circumstances, and that if they mixed up suits before judges with money loaned to those judges they perchance were going to present the appearance of deceiving their companions, the lawyers of the opposite party, and to give rise to the impression or suspicion that they were scoundrels who, lacking the legal knowledge to gain their suits, made use of loans more or less indirect and more or less in exchange for a positive victory at each step. And Messrs. Mott and Cornwell were not disposed to have such things thought of them. But at the same time perhaps they were fraid of what might happen to their client if they abandoned him in that difficult situation. Then they sought the advice of Mr. Pettingill. * * *

"With whom would they consult? With Pettingill as a lawyer, or with Pettingill as the prosecuting attorney? If the understanding was to consult with

the *lawyer*, what necessity had the personal skill of Messrs. Mott and Cornwell for such advice, they likewise being lawyers? The person with whom Messrs. Mott and Cornwell agreed to consult was Mr. Pettingill as prosecuting attorney, because then for what purpose was the promissory note delivered to Judge (Prosecuting Attorney) Pettingill?

"The consultation took place, and naturally from it followed its extraordinary consequences."

(June 9, 1906.)

Logic.

"In the pitiful story told by 'The Porto Rico Review' the personages continue marching in review. The plot needs all its varied colouring, the actors need to come forth from the ranks in order that each one may be shown in the character which animates him within the action of this most pitiful story.

"Mr. Scoville, Clerk of the Court. $800 requested from a litigant are taken and owed to that litigant. But the Judge gave no writing to the litigant, but 'caused a note for the amount stated to be drawn payable to the Clerk of the Court.' Judge McKenna knew that the creditor was Valdes Cobian; he knew that if he executed a promissory note for that sum to the Clerk of the Court he was a party to a falsehood, since he owed not a cent to him and since he was taking it in a surreptitious way so as to deceive those who might wish to know from whom he had requested the loan. Mister Clerk, perhaps engrossed in his many occupations, or perhaps under the pressure of suggestion as to what the authorities (officials) of the Court were doing and were causing him to do, accepted, as it appears, the part which was assigned to him. And he went ahead. He gave the promissory note to Mr. Mott, proving that he knew that, coming from Judge McKenna, the document ought to arrive at its designation by the way of Mr. Mott. He delivered it to the latter in exchange for 800 dollars in bills, coming from Sr. Valdes Cobian.

And in the custody of whom did the promissory note remain deposited? Of the Prosecuting Attorney, of the lawyer, of the citizen of Porto Rico, Mr. Pettingill? 'The note was delivered to Prosecuting Attorney Pettingill.' It appears, therefore, that Mister Clerk of the Court did what he did without giving sufficient thought. Judge McKenna persuaded him that he should be his creditor, and he acceded to that although the act were fictitious.

"Sr. Valdes Cobian, the Litigant. They told him that Judge McKenna needed some money. The effect produced on Sr. Valdes by this news was unpleasant. He was expecting from Judge McKenna the decision of a suit and was awaiting a favorable one with confidence in the justice of his cause. That unexpected sabre-stroke made him suspicious. He was defending his interests but never disposed to place himself beyond the law. What did that loan signify? Was it an accident, innocent, pure, transparent, diaphanous, which had behind it no double design? Was not the occasion taken advantage of, an invitation to bribery, an insinuation half promise and half threat? Sr. Valdes in his thoughts did not meet with the solution of that grave doubt. To give 800 dollars to serve the interests of the poor old man, Judge McKenna, was not a difficult thing. But, to give them without ulterior motive. On the other hand, to give money in order to be laughed at by everybody and to buy judgments, committing the crime of bribery which the Code punishes whoever may commit it, that, never.

"Sr. Valdes was not disposed to violate the laws. But on the following day what luck would befall him in the matter in which a judgment ought to be rendered. Then his lawyers returned. They had conferred with the prosecuting attorney, Pettingill. The latter had agreed that 'the situation was unbearable and unpardonable.' Everything appeared feasible and correct. Forward, then, Sr. Valdes Cobian, shielded by the opinions of the Prosecuting Attorney and his lawyers sent the money to Judge McKenna. It should be inferred that in respect to Sr. Valdes Cobian the circumstances over-

whelmed him and that he acted in the matter correctly and in self-defense.

"Mr. Pettingill, Prosecuting Attorney of the Federal Court of the United States in Porto Rico. Lawyer with an open office. Partner in firms of lawyers in active practice. President of the Bar Association of American Lawyers in Porto Rico. This gentleman appears also in the pitiful story taking part in the proceedings. In the account of 'The Porto Rico Review' he is presented at first as an advocate 'who will make known the truth in Washington,'—doubtless the truth of the events which have occurred in the Court.

"Afterwards Prosecuting Attorney Pettingill disappears completely from the little story. He is not to be found, try as one may, neither as prosecuting attorney, nor as lawyer, nor as citizen of Porto Rico, nor as President of the Bar of American Lawyers. These gentlemen, the lawyers, were acting their parts alone, indignant, and resolved not by any means to consent that the good name of the toga should remain injured by the equivocal conduct of the Judge. Prosecuting Attorney Pettingill only comes in again to receive from the hands of Judge McKenna the resignation of his office and to finish a consultation and give some advice which the lawyers of Sr. Valdes Cobian sought from him.

"But was Prosecuting Attorney Pettingill so ignorant of the matter as not to believe it a part of his duty to do and say things of greater weight? Was the duty of the prosecuting attorney of the Federal Court in Porto Rico to relate what was occurring in Washington? Was it the sole duty of the aforesaid prosecuting attorney to receive from the hands of Judge McKenna his resignation? Did the giving of advice to lawyers and litigants under such difficult circumstances constitute the only mission of a prosecuting attorney who represents in an American court the judicial department of the United States in Porto Rico?

"But what is a prosecuting attorney? What must a prosecuting attorney do? What are the duties of a prosecuting attorney? For what does that which

is called a prosecuting attorney hold his position? If the prosecuting attorney of a court commits a crime, who judges him? And if the judge of another court fails in his duty, who makes complaint against him? Are the courts in the United States made so that those who are on the inside protect one another, covering up their delinquencies, if they should have committed any, and trying to obscure the path of logic so that the community may not know the truth?

"Judge McKenna, forgetful of his obligations, desired to request and did request from the litigant, Valdes Cobian, the sum of $800 exactly at the moment when the former ought to have decided a suit, or a point in a suit, in which Valdes was interested. Prosecuting Attorney Pettingill knew that that was under consideration because, among other reasons, the operation was not carried out until Prosecuting Attorney Pettingill was consulted and his advice sought. The act committed by Judge McKenna constituted, until the latter should prove the contrary, the crime of supposed collusion and bribery. Why, tell us, why did not the Prosecuting Attorney Pettingill make complaint against Judge McKenna before the Grand Jury, still in session? Why did he not go before that Grand Jury and say to it: 'that man is attempting to commit collusion and bribery, and I denounce him in order that you, Grand Jury, may comply with your duty?

"But no. It appears that lawyer Pettingill did not permit Prosecuting Attorney Pettingill to fulfil his duty. All that heap of instances of want of respect for the law and for the people of Porto Rico must continue and it did continue. The lawyers of Sr. Valdes Cobian ask advice of Mr. Pettingill. Is the operation to be put through or not to be? And then why did not Prosecuting Attorney Pettingill advise them that they should in turn advise their client that in no way ought he to lend himself to the persuasions of Judge McKenna who, he knew, was attempting to commit a crime or to appear as an offender? Prosecuting Attorney Pettingill did with the lawyers of Valdes Cobian what he did with the

Grand Jury: neither acted nor spoke. He simply advises them in a way which the lawyers of Sr. Valdes Cobian undoubtedly considered in favor of the projected loan.

"Prosecuting Attorney Pettingill knows that the operation was put through. He could have avoided it, and he did not do it. It was a crime and he passed it over. He knew also that Judge McKenna, receiving the money from Valdes Cobian, was executing, chargeable to the security for that money, a promissory note in favor of the Clerk of the Court, said Clerk being a subordinate of the Judge and a subordinate of the same Mr. Pettingill. That transaction was false. The Judge did not owe for the 800 dollars which he had just received a single cent to the Clerk of the Court. This was the first falsehood. The Clerk of the Court knew that that document was being executed for a transaction entirely unconnected with his commercial responsibility. He affixes his signature and says I owe and will pay. And he did not owe and will not pay anything connected with those 800 dollars, because justly he owes nothing. Here is the second falsehood. It is not known whether that document was endorsed or not and, if it was, it is not known by whom. What is known with certainty is that Mr. Pettingill kept the document in his pocket in order to carry it to Washington. And why did not Prosecuting Attorney Pettingill then rise in his wrath and, calling attention to the promissory note falsely executed, make complaint to the Grand Jury of another crime? Nothing; he did nothing. Of what Mr. Prosecuting Attorney did in Washington we will speak at the proper time.

"In the pitiful story logic, that terrible logic whose light is as strong as the light of the sun, is saying to the whole world that the Lawyer Pettingill conquered Prosecuting Attorney Pettingill; which completely effaced him from the annals of duty done. He ought to have been a prosecutor, and he was not a prosecutor. He failed in his duty at the crucial moment when the court was in a great conflict. In the moment when the voice of a North American calling for justice ought to have made itself heard in

the precincts of the Court, ought to have proved that justice is honored among the people of the United States, ought to have repeated the fine example given by Judge Holt who, in the same precincts, said—the North American to the Grand Jury of Porto Ricans—'that is the crime of smuggling! Your duty is to indict the smugglers!'

"But, no. Prosecuting Attorney Pettingill did not care to remove the clouds. There he stands, within the reach of the just censure of public opinion so that all the world may say that that prosecuting attorney ought not to exercise his profession as a lawyer. Prosecuting attorney, lawyer, man of society, whatever he may be, it is his duty to comply conscientiously with the obligations contracted in the social environment in which he lives.

"'La Correspondencia' will give information to its readers of any new data which are connected with pitiful stories. We have faith in the future and in honest men. We believe in God who aids the weak against those who might perchance imagine themselves strong, considering our native land as an uncivilized country and the Porto Ricans as a glebe of Pariahs who know not how to defend their tribunals or their rights."

(July 7, 1906.)

"The Law Must be Obeyed.

"The Executive Council, which has had the misfortune to remain outside of the curtain, when the curtain was lowered, that is, by voting in favor of the consumption by the orphans and the prisoners of food which was spoiled and determined to be destructive to health, at the moment when the American people and government were declaring that kind of food unwholesome and fit to be thrown away, the Council, we say, Executive, we say, is highly amiable. But when it makes itself amiable by forgetfulness of the laws, it will gain from the people discontent rather than applause.

"The Foraker law established an Executive Coun-

cil which is at the same time a Legislative House which works in conjunction with the House of Delegates. Is this the fact? All the laws of the Legislature of Porto Rico are laws made by both Houses, which have received the veto neither of the Governor nor of Congress. Is this the fact? Every law adopted which originated in the House is also a law of the Council, and every law of the Council is also a law of the House. Is this correct? The obligation to comply with the laws adopted by the Porto Rican Legislature is unavoidable on the part of the Executive Council. Is this also true? And now, a steamship company, wanting in respect to the regulations of the Commissioner of Interior and desiring apparently to monopolize the waters of Porto Rico, threatens we know not what wrathful lawsuits which would have to fall upon the sufficiently long-suffering body of Porto Rico.

"And these indications of important suits are the occasion for a lawyer, or a representative, or a defender, or we know not what of said Company to hold conferences with the Council for the latter to listen to him and recognize in him a personality within the laws sufficient for him to address himself to it with an officiousness which we consider entirely out of the law. Very well; that lawyer is lawyer Pettingill, a North American gentleman who is the prosecuting attorney of a North American Court who thinks he can exercise the duties of prosecuting attorney, collect a large salary from the Treasury of Porto Rico, and bring suits against the People of Porto Rico, offending, slandering and despising its governmental representatives.

"The Legislature of Porto Rico adopted a law prohibiting the prosecuting attorneys of the Courts from practicing their professions as lawyers. That law is the law of the Council because it is a law of the legislature. The Council is obliged to comply with it and, if it does not, the Council will be the first to violate the laws which itself enacts. Nowhere have we seen an indication that Congress would ever have thought the government of Porto Rico might be a government facing one way when an American was

involved and the other way when a Porto Rican was involved. We know not that there exists any Proclamation of the President notifying the government of the Island that the Prosecuting Attorneys of the Courts which the Government at Washington established in Porto Rico have a right to practice their profession; and to bring suits against the people of Porto Rico, which is the one which pays him, and which he ought faithfully to serve, without ever insulting its governmental authority. Neither do we know in what law the Executive Council finds authority for violating the Porto Rican laws, and whether it is that the Council is thinking it is sufficient that Juan or Pedro may say that in the United States the prosecuting attorneys of the courts practice as lawyers and take business against the people of the United States.

"If Mr. Pettingill, who is a man as much bound as any other, or more than any other, to a compliance with the laws, should wish to overleap those of Porto Rico, which is paying him a lavish salary, not on that account ought the Executive Council to forget its duties, nor ought it to vacillate in complying with its obligation, nor ought it to do with Mr. Pettingill what it certainly would not do with a Porto Rican under like circumstances. The Council ought not to comply or comply with the law because the person whom it should affect may be a native or a North American.

"Let the Council say: If a prosecuting attorney of a court of the island should present himself representing private interests and, putting one side his public functions, should begin suit against the people of Porto Rico which the Council should represent, should ask for hearings and conferences and whispered interviews in order to settle such and such questions which, if they should not be settled, would give rise to lawsuits which would cost the island sums of money; if the Council should see a prosecuting attorney of a court of the island mixing in such matters, what would the Council do? The audacity of such a prosecuting attorney to whom a salary is paid from the public treasury, would be punished at

once at least by rejecting his pretensions because of want of capacity so to act. And how, then, does the Council not do the same with all the world, whatever may be the country in which the prosecuting attorney may have been born?

"The Porto Rican prosecutor might claim that the Council, ignoring the law, should recognize him as a practicioner, and he would be refused; but the other prosecutor, who claims also that the Council should ignore the law, its law, without there being any American law in conflict with the Porto Rican law relative to the exercise of their profession by prosecuting attorneys; the other prosecutor, we say, appears to have a free field. Do two similar acts induce in the Council two distinct criteria? It cannot be. Honesty rejects even the possibility of those acts.

"If the law in Porto Rico says that the prosecuting attorneys of the courts must not exercise the profession of lawyer, the Executive Council cannot take into consideration any business or proposition, or petition, or presentation of lawsuits, or intervention of any kind, which issues from, or in which intervenes, or in which represents any interested party, any man whatever who, being a prosecuting attorney of a court, claims against the laws of Porto Rico to exercise his profession as a lawyer against the people of Porto Rico.

"Unless the Executive Council acts with justice, repelling every person who under such conditions should attempt to establish understandings with it, it will be the first to violate a law of the Legislature of the island which prohibits prosecuting attorneys of the courts from practicing the profession of law. The House of Delegates should then know what course to pursue. In order that the Council may be satisfied with itself, in order that it may have a right to the gratitude of the community, it must take care of itself, it must give attention to what it is doing.

"This is not a question which can be passed in silence. This is not a question suitable for some persons to protect the rest. This a question which vigilant men ought to analyze. Whether it be be-

cause tempestuous winds threaten in the American nation immorality and vice. Or whether it be because Porto Rico in these unfortunate days is a field of observation for those who may claim to be considered as statesmen and may wish to give proof of the sincerity of their purposes."

"(October 3, 1906.)

"*Accusations Against the Executive Council. 'Said Council' Subjected to Abuse. The Executive Council Accused of Being Influenced by Important Personages. That it Acts Unfairly and in Bad Faith and Makes Private Arrangements with Companies, Says Accuser Pettingill.*

"A suit is at present going on in the Federal Court between Mr. A. L. Arpin, plaintiff, and the 'Porto Rico Power & Light Company,' defendant. It involves the concession of the Falls of Comerio. Lawyer Pettingill, the prosecuting attorney of the court before which the suit is being heard and a lawyer employing himself in suits against the people of Porto Rico, is the lawyer of the plaintiff.

"As the question refers to a concession made by the Executive Council, whose members are appointed by the President of the United States, the acts of that Council are discussed and criticised in that suit. As to these lines it is not a question of who is right or is not right, a question which the competent tribunal ought to decide according to its justice and wisdom.

"Here it is only attempted to be shown the manner in which the prosecuting attorney of the Federal Court acts as a lawyer practicing his profession in a country like this in which the laws prohibit the prosecuting attorneys of the courts from practicing their profession as lawyers and the employees who receive salaries from the People of Porto Rico, to whose laws they must swear fidelity, from violating their duties by fighting against Porto Rico and insulting the Corporate Bodies created by the Congress of the

United States and selected and appointed by the President.

"Doubtless the Executive Council, considering its many distractions, will not have had time to recite that famous triplet of the Grand Duchess of Gerolstein:

> "Behold what is said of me
> "In the Gazette from the Zuyder Zee.

"But even had it the skin of a pachyderm and the falsehoods and insults of which they make it the target went in at one ear and out at the other, it is necessary to admit that what it represents in Porto Rico obliges it to take care of itself and to present itself before the people of Porto Rico with the respectability with which it ought to clothe itself, even if not out of consideration for our own people, at least out of respect for Congress and for the President who modelled and designed it in order that, as a law-maker and executor of the law, it should labor in this island.

"In the bill of complaint in the suit referred to and in the eighth paragraph it says, translated, this:

"'* * * the said lawyer has also always been offering to accept said concession on as favorable terms to the Government and the public as any other applicant, notwithstanding which said Executive Council has on two different occasions previous to the grant to defendant herein granted concessions to other parties who were not entitled thereto under the provisions of law above referred to * * *.'

"In the tenth paragraph it is said:

"'That said Committee (that of Franchises) of the Executive Council announced no conclusion touching the propositions aforesaid, and held the matter under advisement—at least, without a decision—from the date of said hearing until the 8th day of August, 1905, on which date it made a report to said Executive Council recommending the rejection of both bids, but assigned no reason for such recommendation. But the lawyer alleges that from subsequent developments it appears that such action was induced by the subtle influence of prominent and powerful

persons interested in defendant company, which had then been recently organized; * * * that even at the time of the submission of the propositions aforesaid in February, 1905, negotiations had been begun for a merger of these competing interests in such manner as should attract additional capital, and before the action of said Franchise Committee on the 8th day of August aforesaid such merger had been practically completed through the instrumentality of forming the defendant corporation and agreeing to transfer to it the properties and interests of said Valdes and the San Juan Light & Transit Company and interesting therein the prominent and powerful persons before referred to; that it was apparent to those interested in the new defendant company that no reason or excuse could be suggested in that behalf of said Franchise Committee whereby they might prefer the pending proposition made by said Valdes over that of your orator; hence it was conceived that if said Committee could be induced, upon some intimation that upon a readvertisement for bids under changed conditions a new and more powerful bidder would enter the field, or other inducement equally subtle and elusive, to reject the pending propositions and begin anew with such changed conditions as would be prejudicial to your orator, this new combination personified by defendant Company might have the field virtually to itself. And such result was accordingly brought about. * * *'

"But the lawyer avers that, while said advertisement ostensibly opens the door to all bidders, and wholly ignores the requirements of law hereinbefore specified restricting the right to bid, the same contains one condition giving such overwhelming advantage in bidding to the defendant Company as to preclude the idea of any competing bids, * * * This condition was an absolute change from any previous suggestion of said Executive Council, and was presumably made at the private instance and suggestion of those interested in the defendant company" * * * etc.

"In paragraph number 12 it says:

" 'That such was the purpose of the condition above set forth.'

"In paragraph number 13 it says:

" '* * * the lawyer further avers as additional evidence of unfairness and bad faith and of a private prearrangement between said Executive Council and the defendant company, that while the advertisement * * *,' etc.

"In paragraph 14 it is written:

" '* * * this last provision, your orator alleges, is not only unreasonable and unprecedented in any advertisement intended to invite fair and open public competition, but makes the same useless, the favored bidder having full advantage of the bids of all others in the "treating and bargaining" which is to follow.

"And the lawyer avers that the course of action of said Executive Council, and the circumstances surrounding the same, and resulting therefrom, plainly show that the said provision was inserted in said advertisement in bad faith and for the specific purpose of allowing said council to remain free from the obligation of accepting the lowest bid, * * * so that, whatever might be the other bids submitted, the bid of defendant might be preferred and afterwards, under the system of 'treating and bargaining' provided for, the concession might be granted to defendant upon such terms as might seem desirable."

"In paragraph 16 it appears:

" '* * * and on the 4th day of January, 1906, unlawfully, arbitrarily and fraudulently granted the concession in question unconditionally to the defendant company upon terms more favorable than said defendant had itself offered, * * * and the lawyer avers that his petition for said concession could be denied and that of the defendant company admitted and accepted, and the right of eminent domain could be pretended to be granted to said defendant, only by said Executive Council illegally and wrongfully claiming and exercising the power as a legislative body to make laws and regulations concerning the granting of franchises and concessions wholly differing from, and inconsistent with, the ex-

press provisions of existing law, which power the lawyer avers said Executive Council has never legally possessed.'

"In paragraph 17 it says:

"'* * * that said defendant, its officers, agents, servants and employees, may be restrained and enjoined by the temporary order and injunction of this honorable court from proceeding with the construction of their said dam and electric plant for the utilization of the water power at the fall aforesaid, under the pretended authority of the illegal and void franchise or concession obtained from said Executive Council of Porto Rico * * *.'

"After all this, which deserves such extensive comment, we believe that the People of Porto Rico have a right to know whether the Executive Council appointed by the President of the United States in this island makes concessions influenced by important personages, takes part in intrigues in order to restrict the right to make bids in the granting of franchises, which are placed under the control of said council, inserts conditions which are made at private request and at the intimation of those interested in the companies applying for said concessions; and if it is evident that it acts unfairly and in bad faith and makes private arrangements with companies applying for concessions—all this in such manner as is alleged by the prosecuting attorney of the Federal court presenting himself as a practicing lawyer in suits directly or indirectly against the People of Porto Rico or its representatives—or if all this is a false imputation, or a series of false imputations, maintained by a North American who perchance may consider the Executive Council as something despicable, guilty of all that of which he accuses it.

"It should be imperative that, if no other recourse remains to this people, we inquire of Congress and of the President who is in this case the calumniator and who the culprit."

The suit of Arpin *vs.* Porto Rico Power & Light Company, ade the subject of the article of October 3d last above oted, had been begun in the Federal court in March, 1906,

and had been alluded to in the article of April 28 above quoted, but at that time had created little comment and caused no criticism of plaintiff from any other source, as the filing of the suit charging defendant with the forging of the will was then fresh in the public mind; but at the time of this last publication plaintiff was absent from the island on vacation, and on the day following the franchise committee of the Executive Council submitted to said council a communication calling its attention to said published article and asking for the appointment of a special committee to report whether the statement contained in the periodical was correct, and, if so, "what action should be taken," etc. (page 66). Such committee was appointed and on the next day made a report which appears recorded in the minutes of the council in the following form (page 67):

> "The special committee appointed at the request of the committee on franchises, privileges and concessions to investigate an article in the periodical 'La Correspondencia de Puerto Rico,' published October 3, 1906, in which article it is stated that N. B. K. Pettingill, United States District Attorney for Porto Rico, had made certain statements in a bill of equity filed in the United States District Court for Porto Rico, derogatory to the dignity of said committee on franchises, privileges and concessions of the Executive Council, and to recommend what action should be taken by the Executive Council in the event the statements reported in said article be found correct, submitted a report stating that it had applied for and received a copy of said bill in equity and that said statements do appear therein, as reported by said periodical.
>
> The special committee therefore recommended that the matter be referred to the Governor of Porto Rico for submission to the authorities in Washington with the request that they cause such steps to be taken as they may deem necessary to satisfy themselves regarding the truth or falsity of the accusations made, and for such other action as they may deem best."

That report was adopted, and, as a result of such proceedings, plaintiff received from the Attorney General of the United States a few weeks thereafter the following letter:

"OCTOBER 23, 1906.

"SIR: By direction of the President, I bring to your attention, for such explanation as you may have to make:

"First, the allegations in the bill in equity of Arsene L. Arpin against The Porto Rico Power and Light Company, in which it is charged that the Executive Council has been guilty of fraudulent and corrupt conduct in the granting of a franchise to the respondent corporation.

"It is (not) suggested that charges of that kind ought to be suppressed or are not appropriate for inquiry and decision in the courts of law; but the point is that an officer of the United States, deriving his powers from the same kind of an appointment as the Executive Council, ought not to make them.

"Second, to the charge that, while United States Attorney, you have brought actions at law and in equity against the Government of Porto Rico, the point being that it is not consistent with the proprieties of your office that that should be done.

"I should be glad to hear from you at an early date.

"Very respectfully,
(Signed) "WILLIAM H. MOODY,
"Attorney General."

Plaintiff replied to the above by a letter written in Washington (as the above letter had found him on vacation) on the 7th day of November following. It is long and not necessary to be inserted here, but can be found on pages 115 to 121 of the Record. Plaintiff was removed by the President from his office of United States Attorney by cable received on November 29, 1906.

The original complaint was filed by plaintiff on the 25th day of April, 1907, but as it was afterwards rewritten the complaint as thus amended is the first shown by the pres-

ent record. The cross-complaint of defendant was filed on the 14th day of December, 1908, but previous to that date and subsequent to the filing of plaintiff's suit defendant had begun a separate suit against plaintiff, basing his complaint principally upon the publication of plaintiff's letter to the Attorney General in a newspaper published in San Juan called the "Porto Rico Review," in its issues of February 23rd and March 3rd, 1907. The change of form into a cross-complaint in the suit of plaintiff was the result of an order of the court consolidating the two actions.

The substance of plaintiff's complaint was that he was a lawyer of good reputation and standing and the incumbent of the office of United States Attorney at the time of the publication by defendant of the series of articles in question (p. 2); that said articles were published with actual malice, caused plaintiff's removal from said office, and otherwise injured him in his feelings and reputation (pp. 8, 9). Defendant first moved to strike out certain language from various paragraphs of the complaint (pp. 9–16), then demurred to it (p. 17), then answered it (pp. 19–22), and at the same time filed his cross-complaint (p. 22). The answer was a denial of all the material allegations of the complaint, except the publication of the articles for which defendant claimed he was not responsible, and some language faintly hinting at a justification.

The cross-complaint counted upon the following paragraph of the letter from plaintiff to the Attorney General:

> "It took the Council six months to discover that such action on my part involved an alleged impropriety; and even then the discovery was made only under the whip lash of a Porto Rican editor whose only motive was personal animosity towards me because I had, in a suit brought by me as counsel for a private client, preferred charges against said editor of having forged a last will and testament in favor of his wife for a share in an estate of large value. That the action of the Council was based upon the articles published in the newspaper belonging to the

individual, and not at the instance of any party to the litigation, appears in their own records."

This cross-complaint was answered by plaintiff by a spe-fic denial of responsibility for its publication and by plead-g the statute of limitations (p. 24). Upon the issues so rmed the trial was had, resulting as above stated in a ver-ct for plaintiff.

We are now prepared to discuss the various matters as-gned (R., 28-38) as error by the defendant.

ARGUMENT.

I.

The first error assigned is the ruling of the court that e complaint set forth a publication against plaintiff which s libelous *per se*. The extracts from the above series of icles which were counted on in the complaint are found pages 2 to 7 of the Record and have been italicized in the l copies of the articles included in the foregoing state-nt. The language there used shows, if we understand the aning of language, a clear intent to injure plaintiff in profession as a lawyer and to induce the public to be-ve that he was intentionaliy and continuously violating law and guilty of unprofessional conduct.

The law of libel as it exists in most of the States is ap-cable in Porto Rico, as will appear from the statutory inition of libel, which is found in section 568 of its vised Statutes of 1902 and which reads as follows:

> "Libel is the malicious defamation of a person made public by writing, printing, sign, picture, representation, effigy, or other mechanical mode of publication tending to subject him to public hatred or contempt, or to deprive him of the benefit of public confidence and social intercourse, or to injure him in his business, or in any other way to throw discredit,

> contempt or dishonor upon him, or malicious defamation made public as aforesaid, designed to blacken or vilify the memory of one who is dead and tending to scandalize or provoke his surviving relatives or friends."

As long ago as 1845 this court exhaustively considered the whole subject, defining those libels actionable *per se* as follows:

> "Thus it is said that words not otherwise actionable may form the basis of an action when spoken of a party in respect of his office, profession or business. (Citations.) Again in Lumby *vs.* Allday (1 C. & J., 301), where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation.
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> * * * * * * *
>
> "The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself; justification, excuse or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced.

> The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms."
>
> White *vs.* Nichols, 3 How., 266, 285, 291.

Many courts in many cases during the intervening years have in language more or less similar, but seldom more illuminating, declared actionable *per se* any publication tending to injure a plaintiff in his business or profession; such decisions being too numerous to require citation—especially in view of the late additional pronouncement of this court upon the subject:

Peck *vs.* Tribune Co., 214 U. S., 185.

We may, however, add a few other leading State and Federal decisions declaring the principle:

Tillotson *vs.* Cheetham, 3 John., 56.
Tawney *vs.* Simonson, etc., Co., 109 Minn., 341.
Lathrop *vs.* Sundberg, 55 Wash., 144.
Kidder *vs.* Bacon, 74 Vt., 263.
Wefford *vs.* Meeks, 129 Ala., 349.
Burt *vs.* Newspaper Co., 154 Mass., 238.
Culmer *vs.* Canby, 41 C. C. A., 302.
Davis *vs.* Shepstone, 11 App. Cases, 187.

II.

The second assignment contains fourteen specifications of error, based upon the denial of defendant's motion to strike certain allegations of the complaint (pp. 9–16).

Of these specifications all but the XIth and XIIth refer

to allegations mentioning plaintiff's office of United States Attorney, stating as a common ground to strike that assigned in the first specification, to wit:

> "Because, plaintiff having been removed by the President of the United States from said office of United States District Attorney for reasons deemed sufficient by said President, the same are not and cannot be made the subject of inquiry herein, and hence plaintiff's removal by the President cannot be urged as an element of damage herein."

To refute this contention it is only necessary to revert to the case of White *vs.* Nichols, *supra*, wherein it appears from the complaint (a copy of which is inserted on page 274 of the Report) that the very basis of plaintiff's action there was letters written by defendants to the President and Secretary of the Treasury urging the removal of that plaintiff from the office of Collector of Customs—and which were alleged to have caused that result. As these letters were addressed directly to those officials the defence of privileged communication was set up, and was sustained by the trial court; but no suggestion was made that defendants could not be held responsible for *their* acts because plaintiff's removal had been based on "reasons deemed sufficient to the President." On appeal in this court the judgment was reversed because the trial court had failed to hold that the defence of privileged communication was a qualified one effective only in the absence of actual malice.

The court below, instead of committing error to the prejudice of the defendant in the respect alleged, ruled more favorably to him than the law required when it excluded from the consideration of the jury in estimating damages the amount of the plaintiff's salary from the date of his removal to the end of his term of office.

Sunley *vs.* Insurance Co., 132 Iowa, 123.

Kidder *vs.* Bacon, *supra*.

Moreover, even if error were committed for the reason here specified, such error was rendered harmless by that part of the court's charge which directed the jury that

> "It is also fundamental under our system of government and our laws, that whenever the Chief Executive of the Nation or of any State is vested with the power of appointing an official and of removing him, such action of the Chief Executive of the Nation or the State is not subject to question in any tribunal, and therefore, although you may believe from the evidence in this cause that the plaintiff was removed by the Chief Executive of the Nation from his office of United States Attorney for the District of Porto Rico, still that fact must cut no figure in your verdict one way or the other; nor can you when estimating any damage to which you may believe the plaintiff entitled, if you find for him under these instructions, take into consideration the question of his removal from office at all for any purpose, nor can you take into consideration his loss of salary because of such removal, as an element in estimating his damages" (p. 127, bot.).

It seems sufficiently settled on both reason and authority that error which is harmless or without prejudice, whether cured by instructions to the jury or in any other manner, will not be considered cause for reversal.

Drumm-Flato Com. Co. *vs.* Edmisson, 208 U. S., 534.
Texas & P. Ry. Co. *vs.* Volk, 151 U. S., 73.
Hartford, etc., Co. *vs.* Unsell, 144 U. S., 439.
N. Y., L. E. & W. R. Co. *vs.* Madison, 123 U. S., 524.
So. Ry. Co. *vs.* St. Louis, etc., Co., 82 C. C. A., 614.
Gilmore *vs.* McBride, 84 C. C. A., 274.

Specification VI also states as a ground that the matter specified "relates solely to the acts and doings of the Legislative Assembly of Porto Rico and therefore not proper subject of discussion in this suit nor one that can be urged as an element of damage against defendant herein." The para-

graph of the complaint which was the subject of this specification was the sixth which counted on an article in defendant's newspaper wherein he had published what *he thought* the Legislature of Porto Rico considered immoral about the acts of plaintiff and had stated that "the legislative power of the island was illegally opposed by the lawyer, Mr. Pettingill," etc. The reason given for the XIth specification, which asks that the 9th paragraph of the complaint be stricken, is identical; and that stated in the XIIth specification, which asks that paragraph 10 of the complaint be stricken, is similar in that it alleges that the Executive Council is also a legislative body and, as such, the same consideration above stated applies.

The reasons above recited were, we submit, stated upon a mistaken idea of the purpose of such allegations in the complaint. That purpose was not to question the motives which actuated the members of the Legislature or the Executive Council, as the case might be, or to question the validity or effectiveness of the action taken, but to show the *motives of defendant* in referring to those bodies and attempting to influence them to follow a certain course of action. It is doubtless true that the motives of members of such bodies cannot be questioned for the purpose of bringing home to them responsibility for their actions; but here the responsibility alleged was not that of the legislative body or any of its members, but of an outside party for *his* action in making false statements which had caused such body to injure plaintiff. Whether the entity thus wrongfully influenced is a legislative or an administrative body or an individual, the wrongdoer is responsible for results, unless he can show a privilege—and even then his protection is withdrawn where actual malice is shown.

Again, here, as in the preceding specification, any possible error was rendered harmless by that part of the charge to the jury immediately following that last quoted. The court there charged the jury:

"In like manner as with the Chief Executive, the legislative bodies of every jurisdiction under our system of government are also supreme within their own proper spheres, and therefore you cannot inquire into the motives that governed the Executive Council of Porto Rico in its action with reference to the plaintiff Pettingill, because neither this court, nor any other court, has any right to make inquiries in that regard; nor can you consider their action in estimating damages of the plaintiff if you shall find for him under the facts of this case and the law as here given to you. The libel of Pettingill by Zeno Gandia must stand or fall on its own merits. Congress itself, or the President who appoints them under it, alone has power to take action as to the motives governing the action of the Executive Council of Porto Rico, and no court can ordinarily interfere when they act within the scope of their legislative functions" (p. 128).

The only remaining specification is the XIVth, which sought the elimination of a part of the thirteenth paragraph of the complaint, alleging that the result of the libelous attack on plaintiff was further published and circulated throughout the United States through the medium of the "Associated Press," the suggestion being that defendant had no connection with said Associated Press. It was not alleged that he had, nor was such a connection to be inferred from the allegation. Such extended publication was alleged, and we believe rightly, simply on the theory that defendant was responsible for all results reasonably to be expected to flow from *his* act of publication, the repetition of such publication in other periodicals and its distribution by press agencies being some of such results. Merchants Ins. Co. *vs.* Buckner, 39 C. C. A., 19.

It is also suggested that, under the rules and practice of this court, as the fourteen specifications are united in one assignment of error, that assignment must fail if any part of the matter sought to be eliminated was not properly subject to the motion.

Turnbull *vs.* Payson, 95 U. S., 418.
Thieda *vs.* Utah, 159 U. S., 510, 520.

III.

The third error assigned is to the overruling of defendant's demurrer to the complaint as rewritten (p. 16). That demurrer contained two grounds, the second of which was divided into several subheads. They are all practically a repetition of the grounds stated in defendant's motion to strike and have therefore been discussed under the last head; so we shall not repeat what we have already there said, but content ourselves with additional citations:

Chanler *vs.* Town Topics Pub. Co., 88 C. C. A., 269.
Culmer *vs.* Canby, 41 C. C. A., 302.

IV.

The fourth error assigned alleges that the court should have granted defendant's motion for a continuance. As no such motion is included in the record, defendant evidently abandoned the point after filing his assignment.

V.

The fifth error assigned is to the admission in evidence of Exhibits "D" and "E" for the plaintiff. No objection to the admission of these documents is shown by the bill of exceptions (pp. 53, 55). Therefore this assignment is apparently a mistake of counsel.

VI.

The sixth error assigned is to the action of the court in permitting plaintiff as a witness to answer a question of his counsel as to certain action of the Executive Council, the only answer being to refer to a certified copy of their proceedings, which was then admitted over defendant's objection (p. 65).

We are relieved of the necessity of discussing the propriety of these rulings, because the assignment includes two separate rulings, one of which was upon the objection to the oral answer of plaintiff to the question propounded and was plainly harmless; hence not well assigned.

As to the second ruling, however, the assignment is insufficient in form in that it does not "quote the full substance of the evidence admitted," as required by subd. 2 (2) of Rule 21 of this court.

Davidson S. S. Co. *vs.* United States, 73 C. C. A., 425.

Moreover, this ruling, if error at all, is also shown to have been made harmless by the instruction of the court quoted above under paragraph II, by which any consideration of such evidence was withdrawn from the jury (see authorities there cited).

VII.

The seventh error assigned is to the admission of a paragraph from defendant's newspaper, published on October 10, 1906 (p. 68), which stated that extensive reports of the action of the Executive Council against plaintiff had been sent to the Associated Press.

The objections were that "it is not in and of itself libelous," and that "it is not shown that defendant is connected with the Associated Press," but that the publication was only an ordinary news item. The court stated the true distinction when it remarked in overruling the objection that the item was admitted "not that it is itself libelous, but as a part of this whole transaction." That is, it was admissible as a part of the series of articles and as tending to show the malicious intent to injure, which permeated them all.

Meriwether *vs.* Knapp & Co., 211 Mo., 199.

Post Pub. Co. *vs.* Hallam, 8 C. C. A., 201.

VIII.

The eighth error assigned is to the admission in evidence of a statement made by plaintiff as a witness giving the date of his removal from the office of United States attorney.

As we find from the bill of exceptions no objection noted to this statement nor to the question which brought it forth (p. 68), the assignment seems to be without foundation, hence to merit no discussion.

IX.

The ninth error assigned is to the overruling of defendant's objection to the question asked of plaintiff as a witness, "What do you know relative to the circulation of these matters in the United States because of this publication?"

Neither the above question nor any objection thereto appears in the record (p. 69). The answer quoted in the assignment does there appear, and it further appears that said answer was interrupted by objections; but we submit that this does not accord with the proceedings upon which error is assigned, hence such assignment cannot be considered. Moreover, we think it quite apparent from the answer quoted in the assignment that plaintiff admitted he had no knowledge of such circulation, hence such answer could not have resulted in any harm to the defendant.

X.

The tenth assignment relates to two short items from defendant's newspaper, one on the date of plaintiff's removal from office and the other the day previous (p. 70).

As the bill of exceptions fails to show any objection made by defendant at the time said evidence was offered, we forbear to discuss it.

XI.

The eleventh assignment relates to the admission in evidence of the answer of plaintiff as a witness to the question, "What have you to say as to the right of a United States attorney or a prosecuting attorney to practice in the United States his profession in private matters?"

The objection was put upon two grounds—that the matter inquired about was matter of law, and that the inquiry was as to a libel in Porto Rico and not elsewhere (p. 72). The answer began by stating that the question of such right was a matter of law, hence it is clear that plaintiff was expressing merely his opinion, citing the custom in the United States as corroborative thereof, and was so understood by the jury. But when the judge took that matter from the jury by charging them (p. 120) that plaintiff had the legal right, whatever plaintiff had stated in answer to this question became irrelevant and of no harmful effect whatever as evidence.

That paragraph of the charge which so stated the law was also made the subject of exception, and is before the court under the twenty-fourth and twenty-fifth assignments of error, where that legal proposition will be discussed.

XII.

The twelfth assignment complains of the exclusion as evidence of a certain affidavit made in 1908 by the plaintiff.

This assignment is also technically defective in form in not quoting the affidavit. A reading of the affidavit (p. 111) will, however, be sufficient to demonstrate that the court below was right in sustaining the objection of immateriality. The most it even tended to show was that plaintiff as an individual, not even as an attorney and still less as United States attorney, had assisted a friend in trouble

by furnishing the money necessary for cash bail to obtain the friend's provisional liberty pending an appeal from the Supreme Court of Porto Rico to this court.

The offer of this affidavit is to be considered in connection with the oral statements of plaintiff while being examined as a witness for *defendant* (pp. 110, 112). Plaintiff had admitted that he had been the attorney for this friend, Kent, in his apepal to this court, probably while he was still United States attorney, and had assisted him in a friendly way otherwise, but denied that he had been his attorney in the courts of Porto Rico. Perhaps, the intention was by this offer to contradict him as a witness; but this could not be so accomplished for two reasons—because plaintiff was therein defendant's witness, and because the affidavit did not tend to contradict him. Hence, it was immaterial in any possible aspect.

XIII.

The thirteenth assignment may be disposed of by the suggestion that no such question or objection appears in the bill of exceptions. The statement of the witness to the effect quoted (p. 113) is given in narrative form without question or objection being inserted.

XIV.

The fourteenth assignment complains of the refusal of the trial court to admit in evidence a copy of the proceedings of an insular court in the case there begun subsequent to the dismissal of that in the Federal court wherein forgery of a will by the defendant was charged.

This assignment is also deficient in not incorporating the substance of the evidence offered, and turning to the bill of exceptions (p. 122) we find that the document offered is not preserved therein so that this court can see just what it did

tend to prove. But even if the recital of the bill of exceptions be sufficient that it was a "judgment of the District Court of Ponce in favor of defendants in the case of Francisco Antongiorgi Franceschi *vs.* Manuel Zeno Gandia *et al.*," the agreement of counsel following such recital further shows that therein "an appeal was taken to the Supreme Court of Porto Rico, and that said appeal was dismissed for delay in filing record, and that the time for appealing from the same to the United States Supreme Court has not yet expired;" hence, that judgment had not become final and unappealable.

But, in any event, it was immaterial. Plaintiff, testifying as a witness for defendant, had already stated (p. 121) that the suit in the Federal court over the forgery of this will had been dismissed for want of jurisdiction of parties, and had been subsequently rebrought in the Ponce court. The only purpose defendant could have had in offering this judgment was to show that he had eventually succeeded in winning. But its result could have nothing to do with the purpose for which plaintiff had offered in evidence the bill of complaint in the suit. That purpose was to support his allegation of actual malice on the part of defendant against him, claiming such malice to have arisen from his acting as the attorney of complainant therein. Its final result could be material only in case it would tend to negative the existence of that actual malice. But to show that defendant was finally successful, hence inferentially that the suit had been wrongfully brought, far from tending to show that its bringing had not caused actual malice toward plaintiff, would rather tend to prove the contrary.

XV.

The fifteenth assignment complains of the refusal of the court to instruct the jury as requested by defendant, in the following form:

> "The jury are instructed that the charge contained in the letter of plaintiff to the Attorney General, published in the Porto Rico Review and shown to Messrs. Leake and Bothwell, is libelous *per se*, and the law implies malice from the publication thereof and presumes damage to the person against whom it was directed."

Let us see what the "charge" contained in this letter written by plaintiff really was, and for that purpose we turn to defendant's cross-complaint, in which it was counted on (p. 23), and we read:

> "It took the Council six months to discover that such action on my part involved an alleged impropriety; and even then the discovery was made only under the whip lash of a Porto Rican editor whose only motive was personal animosity towards me, because I had, in a suit brought by me as counsel for a private client, preferred a charge against said editor of having forged a last will and testament in favor of his wife for a share in an estate of large value. That the action of the Council was based upon the articles published in the newspaper belonging to the individual, and not at the instance of any party to the litigation, appears in their own records."

This is from the letter sent by plaintiff to the Attorney General of the United States in response to a communication from him calling it forth, the correspondence appearing in full on pages 114-121 of the record. The only evidence of publication (aside from the copies of the "Porto Rico Review," with which it was not claimed plaintiff was at all connected) was furnished by the examination of plaintiff himself as a witness for the defendant (pp. 114, 122). This testimony, while admitting a technical publication, after its privileged transmission to the Attorney General, tended to negative the presumption of even that malice implied by law and to prove that the presumption of good faith implied from privilege continued. Moreover, being uncontradicted,

t absolutely disproved plaintiff's alleged responsibility for he publication in the "Porto Rico Review." After defendant imself had presented such evidence, we submit he was not ntitled to a charge which ignored the question of privilege nd permitted the jury to regard plaintiff as responsible for he Review articles.

But let us see if the court had not of its own motion harged as favorably to defendant as the law allowed upon he same point. That part of the charge was as follows (p. 30):

> "therefore such answer or report of the plaintiff to the Attorney General of the United States was and is absolutely privileged, and unless you believe from a preponderance of the evidence that said Pettingill after the matter was all over and he had made this report to the Attorney General, * * * unnecessarily and with direct intention and malice against the defendant Gandia, showed copies of his report containing such libel to others than his partners or published the same unnecessarily in the 'Porto Rico Review,' and the burden of proving this is on Gandia by a preponderance of the evidence, then the defendant Gandia has no cause of action at all against Pettingill, and the cross-complaint would be in such case entirely eliminated from this action. But if you believe from a preponderance of the evidence that plaintiff Pettingill did so maliciously and with intent to injure the defendant Gandia show and publish his said answer and report, then you are further instructed that the same contains matter that is libelous *per se* against this defendant Gandia, and you should in like manner find for him, and estimate his damages under the same rules as you are here instructed to estimate the damages for the plaintiff in the main issue, including smart money; but if you shall believe from a preponderance of the evidence that any showing of the said report or answer by the said Pettingill to his partner or others after the matter was all over as aforesaid, and any publication of the same, was done without malice upon the part of the said Pettingill, then and in such case and in like

> manner the cross-complaint must be eliminated from the cause entirely, because as the communication of Pettingill to the Attorney General was not written in malice in the first place, but was in law privileged, then malice cannot be presumed in its favor afterwards, and the burden is upon Gandia to show such malice by a preponderance of the evidence."

We submit that this voluntary charge of the court includes all of the charge requested to which defendant was entitled, and more, too. We say "more, too," for two reasons—first, because the language of the letter was not libelous *per se,* even apart from the privilege; and, second, there was not a scintilla of evidence of actual malice in any publication caused by plaintiff to overcome the privileged character inherent in it.

First, it was not a libel *per se.* We understand that the contrary contention is based upon the repetition of the language of the court pleading with reference to the forgery of the will. But this was no substantive charge, nor the repetition of a libelous communication. It was a proper reference to a statement previously made in a proceeding which was without question absolutely privileged. If fair and reasonable reports of judicial proceedings are privileged, of which there can be no doubt (Dorr *vs.* United States, 195 U. S., 138, 152), then a mere passing reference to a judicial proceeding in a letter also privileged cannot possibly be libelous except upon proof of actual or express malice, hence not so *per se.*

Second, there was no evidence of actual malice, while defendant himself called out affirmative evidence of want of malice. Therefore, the court not only was under no obligation, but had no right, to submit to the jury a supposed state of facts which had no foundation in the evidence. The presence of privileged and the absence of express malice being both undisputed, plaintiff was really entitled to a charge that the cross-complaint had not been sustained, and

e jury had nothing to consider under it. Such an in-uction would have been in accordance with *Sections 570 d 571* of the Revised Statutes of Porto Rico (1902), which ovide:

> "*Section 570.* A publication or communication shall not be held or deemed malicious when made in any legislative or judicial proceeding or in any other proceeding authorized by law. A publication or communication shall not be presumed to be malicious when made:
>
> "First, in the proper discharge of an official duty.
>
> "Second, in a fair and true report of a judicial, legislative, official or other proceeding, or of anything said in the course thereof.
>
> "Third, to an insular official upon probable cause with the intention of serving the public interest or of securing the redress of a private wrong.
>
> "*Section 571.* Malice shall be presumed to exist in any injurious communication or writing made without justifiable motive and addressed to any person other than to a relative within the third degree, or to a person whom the author has under his guardianship or when said communication passes between persons having business in partnership, or other similar association."

XVI

The sixteenth assignment is to the court's refusal to charge jury upon the question of what constituted a publication libel.

f the contention above made is correct, that defendant's lence did not sufficiently sustain his cross-complaint, then denial of this charge clearly could not have injured de-lant, and becomes immaterial. But even were it ma-al, it was sufficiently covered by the charge as given. whole charge went upon the theory that there was no bt of publication on either side, and the part thereof ted under the last head expressly recognized such publi-on and made defendant's recovery under his cross-com-

plaint depend upon the existence of malice *in making the publication.*

XVII.

The seventeenth assignment is based upon the refusal of the following charge, requested by defendant:

> "If the jury should believe that the letter to the Attorney General by plaintiff was shown by said Pettingill to said other persons or that he consented to its publication in the Review, then the jury must return a verdict on the cross-complaint in favor of defendant Manuel Zeno Gandia for such an amount as they think he has reasonably suffered by reason of said charge, but not to exceed $75,000."

Once more, if our contention as to the insufficiency of the cross-complaint or as to the lack of evidence to support it be correct, the correctness of this request becomes immaterial. But, in any event, it is objectionable on several grounds:

(*a*) So far as proper it was embodied in the charge as given.

(*b*) It ignores the privileged character of the letter.

(*c*) It is inconsistent with the provisions of section 571 of the statutes of Porto Rico hereinbefore quoted.

(*d*) It charges responsibility upon plaintiff for publication in the Review merely by virtue of his *consent* thereto, irrespective of any connection therewith or control thereof.

(*e*) It ignores plaintiff's right to show the letter in his own defence against the attacks previously made upon him by defendant, as given the jury by the court upon its own motion (p. 127) and not excepted to by defendant.

The ruling of the court refusing to give it to the jury was therefore correct.

XVIII.

The eighteenth assignment complains of the refusal to give a charge requested by defendant upon the question of exemplary damages.

It is needless to discuss this further than to call attention to the passage of the charge given of the court's own motion, in which the law was given substantially as stated in this request. We will first, however, refer to a part of the quotation from the charge already made under the XVth head, whereby the jury were told that, in the event they found plaintiff had published the libel charged in the cross-complaint with actual malice against defendant, "you should in like manner find for him (the defendant) and estimate his damages under the same rules as you are here instructed to estimate the damages for the plaintiff in the main issue, including smart money" (p. 130). Then, turning back to ascertain what were "the same rules," we find the rule of exemplary damages or smart money stated as follows (p. 129):

> "In addition to this there is another element of damage known as punitive damages or smart money which it is the duty of juries in libel cases to add to the ordinary damages of the cause, and these damages it is the duty of the jury to give when they believe from a preponderance of the evidence that the person who committed the libel did it maliciously and without any good motive for the public good, but with direct intent to injure the person against whom the libel is directed."

This extract from the charge of the court was not objected to by defendant and we think that, coupled with the extract quoted above, making it applicable equally to the cross-complaint, the request refused was not only substantially covered but strengthened. At the same time the principle was made more intelligible to the jury than if the

single phrase "actual malice" had been used as contained in the request.

As the charge requested referred to exemplary damages which defendant might recover from plaintiff on his cross-complaint, defendant cannot complain if the right so to recover was charged more strongly than he requested—and even more strongly than the law warranted.

XIX and XX.

The nineteenth and twentieth assignments are to the refusal to charge the jury with regard to the truth as a defence in either of the following forms:

> "The jury are instructed that if they believe that defendant has established (by) a preponderance of evidence herein the truth of the matters contained in the articles in the 'Correspondencia' then they must find (for) the defendant on the main complaint."

> "In this case the articles in the 'Correspondencia' were directed against the plaintiff in his official capacity and hence the jury are instructed that the truth is a defence and if the defendant has established said truth he is entitled to a verdict on the main case."

In connection with these may be considered the twenty-seventh assignment, which alleges error in what the court did charge the jury upon this point, which was as follows:

> "You are instructed, gentlemen, that while the law of Porto Rico provides that, when a public employé is libeled and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges; this means that he must prove that the acts which he criticized and with reference to which he libeled a plaintiff, were wrong in law and not that they were wrong in the opinion of the person who commits the libel, or others, and whenever a person who has libeled another justifies and attempts to prove the truth thereof

in law, if he fails to do so, that fact may be considered as aggravation of the damages that may be awarded by the jury."

The law of Porto Rico referred to in the charge, just quoted is *Section 572* of the Revised Statutes of 1902, which reads as follows:

"If the plaintiff be a public employee and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges."

In connection therewith should be considered *Section 131* f the local Code of Civil Procedure (Session Laws of 1904, . 221), which reads as follows:

"In the actions mentioned in the last section (slander and libel) the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

If the above *Section 572* had been applicable to the facts f the case, the construction of its meaning explained to the ıry would have been proper and correct.

Mann *vs.* Dempster (C. C. A.), 181 Fed. Rep., 76.

But we submit that the court was in error in giving, as ell as counsel for defendant in error in asking, *any* charge ısed upon the provisions of said *Section 572*, because we ntend that it has no application to the facts here proven. is true that plaintiff was "a public employee," but the bels of him did not refer to "acts connected with his fice"—except in one instance, that of his alleged failure to esent to the grand jury a criminal offense of which he d knowledge. And of course a charge properly applicable one only of several libelous articles should not be given.

Aside from that, the libelous articles against plaintiff referred to acts of his which were entirely *unconnected* with any official duty, the burden of the charge being that he ought not to perform such acts, *although admittedly unconnected* with his official duty, *while holding* the office. Therefore, proving the truth of the charges would not be proving any "act connected with his office;" hence the provisions of that section could not be applicable.

If the truth of the charge had been an issue in the case and any charge upon that subject proper (which we shall contend in a moment it was not), then the quoted section of the Code of Procedure of 1904 would have been the applicable law, as it covers all actions of libel generally. But that section apparently joins "the truth of the matter charged" with "any mitigating circumstances" as two *partial* defenses equally and simultaneously available (though inconsistent) "to reduce the amount of damages"—and for no other purpose. Clearly, if this law be in any degree applicable, the requests to charge were properly denied.

But we go further and contend that neither of these statutes were applicable to the present case in respect to the *effect* of the truth as a defense, that the court was under no obligation to give any charge upon that subject, and that therefore the court was right in refusing both charges requested—and all for the simple reason that the answer of this defendant did not "allege the truth of the matter charged as defamatory," as required by *Section 131* of the Code of Procedure above quoted. Examining the answer carefully (p. 19), it is seen that the paragraph numbered II is the one containing the defense to paragraphs 5 to 9, inclusive, of the complaint (*i. e.,* those setting forth the libelous articles). The first section of this paragraph is composed of denials of the allegations of the above-specified paragraphs of the complaint and of an assertion of privilege. The second section is composed of allegations tending to set up the defense of reasonable criticism of a public official.

The third section may have been intended as a defense of justification, but we submit it falls far short of it. It is worded as follows:

> "And defendant further says that the matters and things set out in said articles in which plaintiff is charged with improper and immoral conduct as an attorney-at-law and as such prosecuting officer, were justified and are justifiable and are and were based upon facts known at the time to defendant in and concerning the conduct of the plaintiff as such attorney-at-law and prosecuting officer, and that that conduct consisted"

in certain things which are enumerated—and to which we shall later refer. First we wish to insist that it is quite different to say that charges are *justified* and *justifiable* than to say that they are *true* as charged. One is a matter of the opinion of the pleader, the other a matter of fact susceptible of proof. It is one thing to say that charges of "improper and immoral conduct" "are based upon facts;" quite another to say that such charges are each and every one of them *true in fact*—and to specify the facts which support each and all of them. Yet the rule of justification, as we understand it, is strict to that very extent. It is elementary that "the justification must be as broad as the libel."

Newell on Slander and Libel (2d ed.), p. 796.
Morning Journal Assn. *vs.* Duke, 63 C. C. A., 459.
Com'l Pub. Co. *vs.* Smith, 79 C. C. A., 410.

And equally so that such a defense must specify facts, not be limited to generalities and conclusions.

Newell, p. 795.
Kansas City Star Co. *vs.* Carlisle, 47 C. C. A., 384.

Examining further the answer to the complaint, it will be seen that paragraph 3 thereof is solely an answer to paragraph 10 of the complaint, and that the subsequent

paragraphs of the answer refer solely to the closing paragraphs of the complaint—and in neither of them is there any reference to the truth of the charges contained in the articles quoted in said paragraphs 5 to 9 of the complaint and counted on as libelous. Therefore we insist that defendant was not entitled to the charges requested which are made the subject of this assignment of error, because he had not made the truth of the libels an issue under his pleading.

But, admitting for the sake of the argument that said last section of paragraph II of the answer is in form a justification, where does it lead us? Continuing the reading from the end of the quotation above made, we find that the specifications of this "improper and immoral conduct" of plaintiff may be condensed into two things: first, that plaintiff failed "to report, as in duty bound, a case or cases to the grand jury of this court for prosecution;" and second, that in various respects plaintiff was unmindful of his professional obligation to "his principal, the People of Porto Rico."

The first contains the germ of a proper justification as to *one* of the libels—and the only one which affected plaintiff in his public office; but, considered with reference to the question of error in denying the requests under consideration, it fails in two respects; it does not set out any specific case of failure of duty in the respect indicated, and there was no proof whatever to support it.

The second also is too indefinite as to any facts, and it is also wholly predicated upon the premise that the People of Porto Rico bore to the plaintiff a similar relation to that borne by a "principal" to his representative or agent; that is, that plaintiff in his capacity as United States attorney was the representative of, and had a professional obligation toward, the legal entity known as the People of Porto Rico; hence could not in good morals represent any one against its interest. If the premise be untrue the fabric falls. To avoid repetition we reserve the discussion of that legal proposition until we reach the assignment covering that part of the

ourt's charge to the jury which dealt with it. Having con-idered that argument, or even without considering it, we hink the court will agree with us that there was nothing to o to the jury upon the question of justification.

XXI.

The twenty-first assignment complains of the refusal to harge the jury as follows:

> "The official acts of the plaintiff, Mr. N. B. K. Pettingill, were subject to the reasonable criticism on the part of defendant Manuel Zeno Gandia, and hence if the defendant went no further than that in said articles then such criticism cannot be shown to indicate malice on the part of defendant."

It is sufficient to say upon this point that this request is remised upon things which the uncontradicted evidence sproved. First, because it was entirely plain from the rticles themselves that the subject of criticism had not been nfined to the "official acts" of plaintiff—indeed, had dealt r more at length with acts having no connection with his fice; and second, because it was equally plain and uncon-adicted that defendant had not confined himself to "reason-le criticism." If the court was right in overruling the emurrer to the complaint, it was also right in refusing to ve this charge because the evidence had in no respect anged the situation.

Moreover, the court had in its own charge embodied what-er part of this request was proper to be given when it arged the jury as follows (p. 128):

> "Newspapers owe no duty to the public that gives them any greater privilege than individuals, but it is fundamental under our system of government that publishers of newspapers may freely criticize and comment upon the actions of all public officials as well as candidates for office when the same is done with good motives, and if said publisher goes no further

> in such criticisms than may be necessary or proper in fairly commenting upon or criticizing such actions just as an individual might do, then the same is what has become known as a privilege of the press, and such publisher or editor is not liable therefor."

It is evident, therefore, that the denial of this request was not error.

XXII.

The twenty-second assignment complains of the refusal to give the jury a charge requested by defendant upon the subject of his intention in publishing the libelous articles.

Of course, if any part of the charge requested was improper it was not error to refuse the request, and in that aspect it is sufficient to call attention to the last sentence of said request reading, "and can take into consideration the training of defendant and *the public sentiment* in Porto Rico in the matter of prosecuting officers practicing in other cases and taking cases against the Government of Porto Rico."

Surely public sentiment could have nothing to do with the intention of defendant, nor could such sentiment regarding other prosecuting officers have anything to do with United States attorneys.

XXIII.

The twenty-third assignment alleges that the trial court erred in charging the jury in effect that plaintiff was a Federal officer, quoting a considerable section of the charge as leading to that conclusion (p. 36).

This court has often decided that, where more than one proposition of law contained in a charge is included in the same assignment of error, the assignment cannot be sustained if any one of the propositions so included is correct. The present assignment includes, among others, the following distinct proposition:

"Congress by the Foraker Act created a complete system of government for this island with a Governor, a legislature and a complete judicial system of its own, which are three co-ordinate branches of the local government and are as separate from each other, save for the peculiar position of the Executive Council, as is the case in a State; and the national judicial authority, as in the States, is wholly separated from the local government by the creation of this court and the appointment of a judge and a United States Attorney for the Island."

We presume that not even the defendant intended to uarrel with that proposition; yet, if correct, the assignment s a whole must fall according to the rule referred to.

Nevertheless, we are prepared to maintain the correctness f the general proposition denied by defendant, that plaintiff n his capacity as United States Attorney for Porto Rico as a Federal official. For that purpose we believe a mere erusal of the Civil Government Act of April 12, 1900, comonly called the "Foraker Bill" (Stats. at L., vol. 31, p. 77), hereby Porto Rico was given civil government and the lice of United States attorney was created, will suffice. As ated by the court below, the national judicial authority as thereby separated entirely from the insular system. By ction 17 of the act a Governor was provided for and his ties defined. By section 18 an Executive Council was eated, one of whose members was to be the attorney genal of the Island, and "each of whom shall reside in Porto ico during his official incumbency and have the powers d duties hereinafter provided for them respectively." Secon 21 provided that "the attorney general shall have all e powers and discharge all the duties provided by law for attorney of a Territory of the United States in so far as e same are not locally inapplicable, and he shall perform ch other duties as may be prescribed by law," etc.

Turning now to section 33, we find that "the judicial wer shall be vested in the courts and tribunals of Porto

Rico as already established and now in operation," and it proceeds to define these courts, their jurisdiction, forms of procedure, officials and employees. Then follows section 34, which begins by saying, "that Porto Rico shall constitute a judicial district," etc., for which the President is to appoint a judge and other officials including a "district attorney." It proceeds to name the court a United States Court and to give it exclusively the jurisdiction of similar courts in the States, to provide that the Federal laws relating to "removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico." The act contains no word defining the duties of the "district attorney," but in section 36, which provides for the salaries, he is designated as "The United States District Attorney."

We think it is therefore reasonably to be presumed that his duties were to be those ordinarily pertaining to officials of like designation—that is, the representation of the United States in all matters of a legal nature, and such other similar duties as the Attorney General of the United States might at any time designate. There is nothing in these sections to indicate any connection with or responsibility to the insular government or its courts. That the practical construction put upon it had been in accordance with this view is shown by the testimony of the plaintiff, uncontradicted, where he says (p. 74):

> "I received my money (salary) under the authority of the Federal Government and I always gave and received instructions as an official of the Federal Government, never as an official of the Island of Porto Rico, and I never took instructions from anybody in the island. * * * Yes, I signed a payroll just as the judge signed it and as every other official signed it."

Moreover, there was no reason for any responsibility of the United States attorney to the insular government, because the provisions of the law already cited gave that government its own law officer, the attorney general, and included within the definition of his duties everything which could relate to his own government. The "district attorney" was identified with the Federal court and the government which its jurisdiction affected.

The provision for the payment of the salaries of these Federal court officials "from the revenues of Porto Rico" will be discussed under the next head.

XXIV, XXV and XXVI.

These three assignments may be considered together. They all allege error in charging the jury in slightly varying language that plaintiff was guilty of neither illegal nor immoral conduct in carrying on a general or private practice as a lawyer in Porto Rico and in the Federal Court, while he was holding the office of United States attorney created by the act aforesaid.

We presume no claim will be made that the local law, governing the conduct of prosecuting attorneys of insular courts appointed by the Governor and under the control of the Attorney General of the Island, applied to one holding the office denominated in section 36 of said act, "United States District Attorney," and appointed, like the Governor himself, by the President. So we pass at once to the contention made in the court below, most directly controverted by the twenty-sixth assignment, that plaintiff had no right to take cases as a practicing lawyer where the local government of the people of the island was the prosecutor or the defendant."

The review already made of the provisions of the various sections of the Civil Government Act probably has sufficed to show the error of this contention. The presentation made

by plaintiff in his letter to the Attorney General (pp. 115–119) further serves to demonstrate it. The only peg upon which an argument to the contrary may be hung is the single fact that the salary of the United States attorney for Porto Rico, in common with all other Federal court officials, is by the same section 36 made payable "out of the revenues of Porto Rico on the warrant of the auditor, countersigned by the Governor." This can hardly be enough to transpose into an insular official owing his professional allegiance to the insular government one whose duties and obligations are entirely Federal. The reason for this anomaly as regards payment of salaries was well explained by the court below in a portion of its charge to which no exception was taken, and to which nothing need be added (p. 125).

> "At this point the Foraker Act makes a radical and anomalous change, in that instead of providing that the salaries and expenses of this court shall be paid directly out of the national treasury, as is customary, it provided that such salaries and expenses should be paid on the warrant of the auditor of the island countersigned by the Governor. This peculiar provision was evidently inserted because in that very same law Congress had done what had never before been done with reference to any Territory beneath the flag, that is, it gave to the island a vast sum of money annually that as to all other Territories goes only into the national treasury and becomes national revenue, that is, the entire customs duties and internal revenues of the island, and further gave the island power to fix the internal revenues to suit itself. No other dependency or Territory has ever been blessed like this.
>
> * * * * * * *
>
> Evidently Congress, after having so blessed Porto Rico above all the other Territories, felt that it ought to pay the cost and expense of sustaining this court, and so that same law provided that not only should there be kept out of the funds thus collected sufficient

> to pay the large number of officials of the customs department of the United States who collect it, even before the funds are turned over to the island, but also provided that after it was turned over the island should pay the salaries and expenses of this court."

The absurdity to which the contention of defendant in this regard would lead is indicated by the above reference to the customs officials, who certainly would not be made insular officials by the fact that their salaries or compensation are diverted from the gross of said revenues before the same are actually turned into the treasury of Porto Rico. It might be suggested as a further *reductio ad absurd* that it was within the *power* of Congress to have provided in the same act that the salary of the President of the United States should be paid out of these same revenues. Would that have made him an insular official? Such suggestions are simply to show that the salary can have nothing to do with the question.

Let us take an illustration of another and more pertinent kind. Suppose litigation should at some time arise, as it may, between the United States or some one officially representing them and The People of Porto Rico. Would it not be as clearly and exclusively the duty of the United States Attorney to represent the interests of the United States in such controversy as it would be that of the Attorney General of Porto Rico to represent the insular government? Yet, in principle, if a professional obligation exists from the United States Attorney to The People of Porto Rico he would have no more right to represent the United States against the insular government than to represent any other client against it. Such a conclusion would, of course, nullify the purpose of his appointment.

The situation as it actually existed was plainly outlined in the replies of plaintiff to the cross-examination of counsel for defendant, as already quoted and as further appearing on page 74 of the Record; and that situation was the natural

and logical development of the comparative provisions of the organic law.

XXVII.

The twenty-seventh assignment has already been considered in connection with those numbered XIX and XX, in a comparison of the charge given upon the subject of the truth as a defence with those requested and refused. It was there contended that no charge on that subject was warranted by the pleadings. It is now contended that the court having given the charge now objected to, such charge substantially stated the law.

The paragraph made the subject of the objection contains two propositions—*first*, that the libelous charge against plaintiff of having violated the law must be proven true in the light of the law as the courts should interpret it, not of what the law might be in the opinion of defendant; and, *second*, that an attempt to defend upon the truth of the charges, when unsuccessful, may be considered a reaffirmance of the libel, hence an aggravation of the damages.

The first was but adapting to the details of the proof the principle that the proof of truth must conform and extend to the real significance of the charge as made. That this is correct is well settled.

Cunningham *vs.* Underwood, 53 C. C. A., 99.
Mann *vs.* Dempster (C. C. A.), 181 Fed. R., 76.

The second has been repeatedly decided in the Federal courts, and we think will hardly be disputed by defendant.

Coffin *vs.* Brown, 94 Md., 190.

XXVIII.

The twenty-eighth assignment involves the charge stating that the articles published by defendant were libelous *per se*. The same question is raised under the first and second assignments, and has been there discussed.

XXIX.

The twenty-ninth assignment complains of a charge to the jury which is a continuation of that complained of under the last assignment. It is based upon the premise contained in the preceding sentence to the effect that the articles counted on were libelous *per se,* and being such, the law presumed malice and plaintiff had a cause of action. The language now complained of merely says in effect—these things being so, you must find for the plaintiff *upon this issue* and give him *some* damages. Granted the premises, there can be no doubt of the correctness of the conclusion thus stated. Another part of the court's charge made clear that the jury might also have found in favor of defendant upon his cross-complaint in such an amount as to offset or exceed what they should find for plaintiff under this instruction.

XXX and XXXI.

The thirtieth and thirty-first assignments relate to the right of defendant to recover under his cross-complaint. The principle involved has been sufficiently discussed under the assignments numbered XVII and XVIII, and we submit that said charges contain no error of which defendant can complain.

XXXII and XXXIII.

The last two errors assigned relate to the action of the court at the time the charge was given to the jury and the exceptions taken by counsel for defendant.

We frankly admit that the course of the trial judge in this matter did not comply with the ideas of proper procedure held by counsel for either of the parties. We had supposed it settled ever since Phelps *vs.* Mayer, 15 How., 160, that exceptions must be taken and stated in presence

of the jury, and we are not aware where the judge below acquired his idea to the contrary. But to maintain that the action of the court as shown in this record constituted reversible error is quite another proposition. As counsel for plaintiff in error will doubtless call attention to the details of this particular incident, it is not necessary for us to do more than point out one or two features which minimize its supposed importance and make harmless the departure of the judge from correct procedure.

The journal of the court as entered on December 16, the day of the trial (p. 25), shows the judge's own understanding of what occurred; wherefrom it appears that counsel for defendant was proceeding "to state his objections at length in the presence of the court and the jury *to the stenographer,*" when the court interrupted, directing the retirement of the jury, but allowing counsel to continue to "state them to the stenographer as a part of the record," to which action counsel objected, and "requests that the jury be kept until he has stated all his objections *to the stenographer* at length as he is doing"—and that was the request the court denied.

Later on, when the stenographer's notes of the trial had been written out for the purpose of making a bill of exceptions, the very words of the colloquy as taken down by him were preserved in said bill, and appear on pages 133 and 134 of the record. Therefrom we find that counsel for defendant first took his exception to the refusal to give the written charges which he had requested, and having been noted, he then asked the court, "May I state my further objections to the stenographer?" And therefrom we see that the use of the same phrase by the court in its journal was not an inadvertence. The reply of the court was, "You may state them after the jury goes." This led to an exception to that action of the court, and to a further exception to the refusal to permit the noting of the first exception. The jury having meantime retired, counsel asked

permission to "note these exceptions before your honor," and proceeded to do so (p. 134). The exceptions so noted are those made the subject of assignments numbered from 23 to 31, inclusive, and hereinbefore discussed.

Counsel then representing the plaintiff believed at the time of this incident that correct practice required what counsel for defendant seems to have had in mind—that is, that counsel have a right to save their exceptions to the charge of the court in the presence of the jury and before it leaves the jury-box; but the record shows that counsel for defendant failed properly to express himself so as to preserve that right. Both the court minutes, made contemporaneously, and the notes of the stenographer, taken contemporaneously, of course, but not written out until later, agree in indicating that counsel insisted upon a right to "state his objections to the stenographer," not to the court, while the reason of the rule demonstrates that its requirement is that objections be stated in the presence of the jury *to the court itself*, so that *its* attention may be called to any errors inadvertently committed in the charge with a view to their immediate correction before the jury has retired. Said Mr. Justice Peckham, speaking for this court:

> "Those propositions in regard to the correctness of which there is a real controversy should be at least called to the *attention of the judge*, so that if he thought it proper he might correct, modify, or explain them."
>
> Holloway *vs.* Dunham, 170 U. S., 615, 620.

If counsel desired only to state objections *to a stenographer*, there was no reason for keeping the jury in attendance, and his request was properly denied.

But especially do we insist that this error, if error it were, resulted in no harm or prejudice to defendant, and hence cannot be ground for reversal. We take that principle to be fully settled, that error without prejudice will not warrant reversal. We have already cited many authorities

under paragraph II, and now add the above case of Holloway *vs.* Dunham and

San Juan *vs.* St. John's Gas Co., 195 U. S., 510, 520.
Cunningham *vs.* Springer, 204 U. S., 647, 655.

Then, since counsel for defendant proceeded to note the grounds which he had desired to note in the presence of the jury, and these grounds have been preserved in this record and are now before this court (compare grounds noted on page 134 with assignments numbered 23 to 31, inclusive), the judgment should not be reversed for the supposed error in procedure, unless merit is found in some of the objections so noted, and which have been discussed under the assignments referred to.

An exactly similar situation arose in a trial in the Circuit Court of the United States for the Southern District of New York, and, as here, counsel for defendant noted his exceptions after the jury retired, and brought them for review to the Court of Appeals of the Second Circuit. That court, in refusing to reverse the judgment for error of procedure, said:

> "Had he taken an exception, when the court instructed the jury to retire, on the ground that their doing so would prevent his reserving exceptions to the charge, which an appellate court could consider, *and refused to take exceptions in the presence merely of the stenographer,* there would have to be a reversal," etc.
>
> Mann *vs.* Dempster, 179 Fed. Rep., 839.

The principle does not differ from that presented to this court in the case of W. B. Grimes Dry Goods Co. *vs.* Malcolm, 164 U. S., 483. There exception had been taken to the action of a trial judge in not permitting a jury to consider further their verdict because one juror was dissatisfied with the verdict which had been agreed upon. This court sustained the Circuit Court of Appeals in refusing to

consider the question of procedure, for the reason that, as the evidence showed that a peremptory instruction would have been proper, "it was not error for the court to direct one juror to do what it ought to have directed all of them to do;" hence the action was without prejudice.

We therefore respectfully submit that the specifications of error alleged by the defendant below are without merit, and the judgment of the District Court of the United States for Porto Rico should be affirmed.

Respectfully submitted,

WILLIS SWEET,
GEORGE H. LAMAR,
Attorneys for Defendant in Error.

GANDIA *v.* PETTINGILL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 97. Argued December 14, 1911.—Decided January 9, 1912.

In the absence of express malice or excess, publication of actual facts is not libellous, and in case of mere excess without express malice the only liability is for damages attributable to the excess; and refusal of the trial court to charge to this effect is error.

Quære: whether attributing to a person conduct that is lawful can be libellous.

The stricter practice is to note the exceptions before the jury retires; but if all the exceptions are noted in open court after jury returns and no wrong is suffered, an exception will not be sustained on that ground.

4 Porto Rico Fed. Rep. 383, reversed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz* and *Mr. H. H. Scoville* were on the brief, for plaintiffs in error:

It was error in law on the part of the trial judge to refuse to permit counsel for defendant below to state, while the jury was yet at the bar, his exceptions to such portions of the court's instructions to the jury as seemed to him to be objectionable either in matter of law or in matter of fact. *Phelps* v. *Mayer*, 15 How. 160; *United States* v. *Breitling*, 20 How. 252; *Dredge* v. *Forsyth*, 2 Black, 563, 564; *Bram* v. *United States*, 168 U. S. 532, 571.

The rule has been frequently reiterated and followed in the inferior Federal courts. *Stone* v. *United States*, 64 Fed. Rep. 667, 677; *Little Rock Granite Co.* v. *Dallas Co.*, 66 Fed. Rep. 522; *Johnson* v. *Garber*, 73 Fed. Rep. 523; *Merchants' Bank* v. *McGraw*, 76 Fed. Rep. 930, 935; *New England Co.* v. *Cathicolicon Co.*, 79 Fed. Rep. 294, 295; *West. Un. Tel. Co.* v. *Baker*, 85 Fed. Rep. 690; *Greene* v. *United States*, 154 Fed. Rep. 401, 412; *Accident Assn.* v. *Fulton*, 79 Fed. Rep. 423; *Dalton* v. *Moore*, 141 Fed. Rep. 311, 314; *Mining Co.* v. *Firment*, 170 Fed. Rep. 151; *Mann* v. *Dempster*, 179 Fed. Rep. 837.

In *Perez* v. *Fernandez*, 202 U. S. 80, 91, this court spoke of the difficulty of undertaking to establish a common-law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence.

In the case at bar, however, the Porto Rican legislature by statutory enactment had "established" the civil action to recover damages for libel and slander and had carefully defined each of such offenses, had established certain rules for the guidance of the courts in the administration of such actions, and had declared in precise phrase

when the existence of malice might or might not be presumed, and had provided by § VI, that if the plaintiff be a public employé, and the libel refers to acts connected with his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

Under the generally established American law in every instance of slander, either verbal or written, malice is an essential ingredient, and whenever substantially averred and the language, either written or spoken, is proved as laid, its existence will be inferred by the law until, in the event of denial, the proofs be overthrown or the language itself be satisfactorily explained.

Under the Porto Rican law publications or communications of certain specified classes (see § 4) are expressly excluded from any presumption or inference of malice—an exception to the law of inference being (see § 5) cases of injurious communications or writings "made without justifiable motive and addressed to persons other than to a relative within the third degree or other persons specifically identified."

Under the American law words prejudicial in a pecuniary sense, *e. g.*, implying unfitness of a person in office, or improper conduct on his part in connection therewith, are said to be actionable *per se*, whereas, under the Porto Rican law (see § 6), if the plaintiff be a public employé and the alleged libel refers to acts connected with the conduct of his office, judgment shall be rendered for the defendant if he prove the truth of his charges.

Under the American law, in a criminal prosecution for libel, the truth of the charges made constitutes no defense: *White* v. *Nichols*, 3 How. 266; *Dorr* v. *United States*, 195 U. S. 138; although it is otherwise in the civil action to recover damages for libel.

Under the Porto Rican law the truth of the matters, written or spoken, of any public employé, is a complete defense to an action of libel and would equally seem to

constitute a defense in the case of private individuals in the absence of evidence tending to show that the publication had been "made without justifiable motive."

At no time did the plaintiff either deny or seek to disprove the truth in matter of fact of any of the statements contained in said publications; on the contrary, he expressly admitted the truth thereof.

The Porto Rican act of March 9, 1905 (Laws of Porto Rico, 1905–1906, p. 123), expressly declares: "Sec. 1. That the fiscal of the Supreme Court, *District Attorneys* and municipal judges are hereby prohibited from engaging in the practice of the law."

Mr. Willis Sweet and *Mr. George H. Lamar* for defendant in error:

The complaint set forth a publication against plaintiff which was libellous *per se*. The language used showed a clear intent to injure plaintiff in his profession as a lawyer and to induce the public to believe that he was intentionally and continuously violating the law and guilty of unprofessional conduct.

The law of libel as it exists in most of the States is applicable in Porto Rico, § 568, Rev. Stat. of 1902; and as to what are libels actionable *per se*, see *White* v. *Nichols*, 3 How. 266, 285, 291.

Any publication tending to injure a plaintiff in his business or profession is actionable *per se*. *Peck* v. *Tribune Co.*, 214 U. S. 185; see also *Tillotson* v. *Cheetham*, 3 John. 56; *Tawney* v. *Simonson &c. Co.*, 109 Minnesota, 341; *Lathrop* v. *Sundberg*, 55 Washington, 144; *Kidder* v. *Bacon*, 74 Vermont, 263; *Wefford* v. *Meeks*, 129 Alabama, 349; *Burt* v. *Newspaper Co.*, 154 Massachusetts, 238; *Culmer* v. *Canby*, 41 C. C. A 302; *Davis* v. *Shepstone*, 11 App. Cases 187.

The court below, instead of committing error to the prejudice of the defendant below, ruled more favorably to

him than the law required when it excluded from the consideration of the jury in estimating damages the amount of the plaintiff's salary from the date of his removal to the end of his term of office. *Sunley* v. *Insurance Co.*, 132 Iowa, 123; *Kidder* v. *Bacon, supra.*

The publications were not justifiable. It is quite different to say that charges are *justified* and *justifiable* than to say that they are *true* as charged. One is a matter of the opinion of the pleader, the other a matter of fact susceptible of proof. It is one thing to say that charges of "improper and immoral conduct" "are based upon facts"; quite another to say that such charges are each and every one of them *true in fact*—and to specify the facts which support each and all of them. The rule of justification is strict to that very extent. The justification must be as broad as the libel. And equally so that such a defense must specify facts, not be limited to generalities and conclusions. Newell on Slander and Libel (2d ed.), 796; *Morning Journal Assn.* v. *Duke*, 63 C. C. A. 459; *Com'l Pub. Co.* v. *Smith*, 79 C. C. A. 410; *Kansas City Star Co.* v. *Carlisle*, 47 C. C. A. 384.

If there was error it was harmless or without prejudice, and whether cured by instructions to the jury or in any other manner will not be considered cause for reversal. *Drumm-Flato Com. Co.* v. *Edmisson*, 208 U. S. 534; *Texas & P. Ry. Co.* v. *Volk*, 151 U. S. 73; *Hartford &c. Co.* v. *Unsell*, 144 U. S. 439; *N. Y., L. E. & W. R. R. Co.* v. *Madison*, 123 U. S. 524; *So. Ry. Co.* v. *St. Louis &c. Co.*, 82 C. C. A. 614; *Gilmore* v. *McBride*, 84 C. C. A. 274.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for libels and comes here upon a bill of exceptions after a verdict for the plaintiff. The alleged libels consist of a series of articles in a Porto Rican news-

paper, La Correspondencia. These articles stated that the plaintiff, Pettingill, while United States Attorney for Porto Rico, carried on a private practice also, and even acted as a lawyer on behalf of persons bringing suit against the Government of Porto Rico. It seems that, if the plaintiff had been an officer of the local government, he would have been forbidden the practice by the local law, and the articles convey the idea that if the practice is not prohibited also by the law for United States officials, it ought to be, especially as the Island is charged with a salary for the Attorney. The conduct of Mr. Pettingill in the above particulars is described as a monstrous immorality, a scandal, &c., &c. In the view that we take it is not necessary to state the charges here in detail, but it should be observed that in the declaration the plaintiff alleged that while United States Attorney he had a large private practice, and implied, as in his evidence he stated, that a part of this practice consisted of suits against the local government. So there was no issue on the matter of fact.

So far as the facts were concerned, the publication of them alone was not libellous. For apart from the question whether attributing to the plaintiff conduct that was lawful, as the plaintiff says, could be a libel, *Homer* v. *Engelhardt*, 117 Massachusetts, 539, he was a public officer in whose course of action connected with his office the citizens of Porto Rico had a serious interest, and anything bearing on such action was a legitimate subject of statement and comment. It was so at least in the absence of express malice, a phrase needing further analysis, although not for the purposes of this case. Therefore the only question open for consideration were the motives of the publication and whether the comment went beyond reasonable limits, which, of course, the defendant denied. But so far as we see from reading the charge, the judge did not approach the case from this point of view. For after saying to the jury

that fair comment upon the actions of public officials was privileged he went on "But you are instructed that in this case . . . [the articles] are what is known in law as libellous per se. . . . Therefore, in any event you must find for the plaintiff upon that issue and give him such damages as you may believe from all the facts and circumstances in the case he is entitled to," and after that proceeded to direct them only as to the conditions for finding punitive damages also. It is at least doubtful whether this instruction meant that the comments were excessive as matter of law. It rather would seem from the previous explanations given to the jury of the independence of United States officials notwithstanding the source of their salaries, and the instructions that the plaintiff's acts were lawful, that the defendant in order to justify himself would have to prove that they were wrong in law, and that his inability to do so might be considered as aggravation of the damages to be allowed, that the latter considerations alone were the ground for what we have quoted from the charge.

However this may be, what we have said is enough to show that the mind of the jury was not directed to what was the point of the case. We do not see how, making reasonable allowance for the somewhat more exuberant expressions of meridianal speech, it could be said as matter of law that the comments set out in the declaration went beyond the permitted line, and we think it at least doubtful whether the plaintiff would not have got all if not more than all that he could ask if he had been allowed to go to the jury on that issue. In the absence of express malice or excess the defendant was not liable at all, and in the case of mere excess without express malice the damages, if any, to which he was entitled were at most only such as could be attributed to the supposed excess. But what really hurt the plaintiff was not the comment but the fact. The witnesses for the plaintiff said that the people of Porto

Rico considered the acts charged immoral, and the statute referred to showed that such was their conception of public duty. It was peculiarly necessary therefore to instruct the jury that so far as the publication of facts disapproved by the community was concerned the plaintiff could not recover for it, however technically lawful his conduct might have been, except as we have stated above. Instructions were requested on the point, and the refusal to give them was excepted to, as also was the corresponding charge. Without nice criticism of the form of the requests it is enough to say that they were so nearly correct as to call the judge's attention to the matter and to require a different explanation of the defendant's rights.

An exception was taken to the judge's sending the jury out before the counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct the jury otherwise than as he had, and he allowed all the exceptions to be taken in open court after the jury had retired. No doubt it is the stricter practice to note the exceptions before the jury retires, (the judge of course having power to prevent counsel from making it an opportunity for a last word to them). *Phelps* v. *Mayer*, 15 How. 160. But in this case they were noted at the trial, in open court, *United States* v. *Breitling*, 20 How. 252; and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground.

Judgment reversed.